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# REPORTS OF CASES

DECIDED IN THE

## COURT OF APPEAL,

DURING PARTS OF THE YEARS 1890 AND 1891.



REPORTED UNDER THE AUTHORITY OF  
THE LAW SOCIETY OF UPPER CANADA.

VOLUME XVIII.

TORONTO:  
ROWSELL & HUTCHISON.

1892.

308865  
7. 1. 53

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JUDGES  
OF THE  
COURT OF APPEAL

DURING THE PERIOD OF THESE REPORTS.

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THE HON. JOHN HAWKINS HAGARTY, C. J. O.  
“ “ GEORGE WILLIAM BURTON, J. A.  
“ “ FEATHERSTON OSLER, J. A.  
“ “ JAMES MACLENNAN, J. A.

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# A TABLE

## OF THE

### CASES REPORTED IN THIS VOLUME.

---

<p style="text-align: center;">A.</p> <p>Abraham v. Abraham..... 436</p> <p>Anderson, Barry v..... 247</p> <p>Anderson, In re Long Point Co. v. .... 401</p> <p>Attorney-General v. The Ni- agara Falls, Wesley Park and Clifton Tramway Co... 453</p> <p>Attorney-General of Canada v. City of Toronto ..... 622</p> <p>Attrill, Huntington v..... 136</p>	<p>Central Bank of Canada v. Garland ..... 438</p> <p>Central Bank of Canada, In re, —Home Savings and Loan Company's Case ..... 489</p> <p>Central Bank of Canada, In the Matter of—Nasmith's Case. 209</p> <p>Chatham, The Corporation of the Township of, The Cor- poration of the Township of Sombra et al. v. .... 252</p> <p>City Mutual Fire Insurance Co., The, The A. G. Peuchen Co. et al. v. .... 446</p> <p>Clark, Barber v ..... 435</p> <p>Crocker, Griffith v..... 370</p>
<p style="text-align: center;">B.</p> <p>Baldwin v. Kingstone ..... 63</p> <p>Barber v. Clark ..... 435</p> <p>Barry v. Anderson..... 247</p> <p>Bell, Wright v. .... 25</p> <p>Blackley v. Kenney, (No. 2).. 135</p> <p>Brantford, Waterloo and Lake Erie R. W. Co. v. Huffman. 415</p> <p>Brockville, Town of, United Counties of Leeds and Gren- ville v. .... 548</p>	<p style="text-align: center;">D.</p> <p>Duggan v. The London and Canadian Loan and Agency Co. et al ..... 305</p>
<p style="text-align: center;">C.</p> <p>Campbell v. The Kingston and Bath Road Co., and Joseph Ryder ..... 286</p> <p>Campbell v. Roche..... 646</p> <p>Canadian Mutual Aid Associa- tion, Redmond v..... 335</p>	<p style="text-align: center;">E.</p> <p>Edmonds v. The Hamilton Pro- vident and Loan Society .. 347</p>
	<p style="text-align: center;">F.</p> <p>Flatt, In re, and the United Counties of Prescott and Russell..... 1</p> <p>Francis, Sullivan v..... 121</p>

## G.

Garland, Central Bank of Canada v. ....	438
Gibbons v. McDonald.....	159
Gosfield, Ontario Natural Gas Co. v. ....	626
Grand Trunk R. W. Co., Sibbald v. ....	184
Grand Trunk R. W. Co., Tremayne v. ....	184
Griffith v. Crocker.....	370
Groesbeck, Hamilton v.....	437

## H.

Hamilton v. Groesbeck .....	437
Hamilton Provident and Loan Society, The, Edmonds v ..	347
Heward v. O'Donohoe .....	529
Hickerson v. Parrington.....	635
Home Savings and Loan Company's Case, In re Central Bank of Canada.....	489
Howard et al., In re Township of Orford and .....	496
Huffman, Brantford, Waterloo and Lake Erie R. W. Co. v.	415
Huntington v. Attrill .....	136

## J.

Jackson, Whidden v. ....	439
Joselin, Wood v.....	59

## K.

Kenney, Blackley v. ....	135
Kingston and Bath Road Co., The, and Joseph Ryder, Campbell v.....	286
Kingstone, Baldwin v. ....	63
Kirkland, McNamara v.....	271

## L.

Leeds and Grenville, United Counties of, v. Town of Brockville .....	548
Local Option Act, In re.....	572
London and Canadian Loan and Agency Co. et al., Dugan v .....	305
Long Point Co., In re, v. Anderson .....	401

## M.

Macdonald, Radford v. ....	167
Magee, Martin v.....	384
Martin v. Magee.....	384
Martin v. McMullen et al....	559
Moynihan, McIntosh v. ....	237

## Mc.

McCaffrey v. McCaffrey.....	599
McCool, McCraney v.....	217
McCraney v McCool .....	217
McDonald, Gibbons v.....	159
McGillivray, Township of, Township of Stephen v....	516
McIntosh v. Moynihan .....	237
McKinnon v. Roche .....	646
McMichael v. Wilkie et al....	464
McMullen et al., Martin v....	559
McNamara v. Kirkland.....	271

## N.

Nasmith's Case, In the Matter of Central Bank of Canada.	209
Neelon, Thorold v.....	658
Niagara Falls, Wesley Park and Clifton Tramway Co., The, Attorney General v. ..	453

## O.

O'Donohoe, Heward v. ....	529
---------------------------	-----



Ontario Natural Gas Co. v. Gosfield .....	626	Sibbald v. Grand Trunk R. W. Co.....	184
Orford and Howard et al., In re Townships of .....	496	Sloan, Regina v .....	482
P.		Sombra et al., The Corporation of the Township of, v. The Corporation of the Township of Chatham.....	252
Paisley v. Wills .....	210	Stephen, Township of v. Township of McGillivray .....	516
Parrington, Hickerson v. ....	635	Sullivan v. Francis.....	121
Peuchen Co. et al., The A. G., v. The City Mutual Fire Insurance Co .....	446	T.	
Prescott and Russell, the United Counties of, In re Flatt and ..	1	Thomas, Sawyer v.....	129
Pringle, Sawyer v. ....	218	Thorold v. Neelon .....	658
R.		Tilbury West et al., In re Townships of Romney and..	477
Radford v. Macdonald .....	167	Toronto, City of, Attorney-General of Canada v .....	622
Redmond v. Canadian Mutual Aid Association .....	335	Tremayne v. Grand Trunk R. W. Co.....	184
Regina v. Sloan .....	482	W.	
Roche, Campbell v.....	649	Whidden v. Jackson .....	439
Roche, McKinnon v. ....	646	Wilkie et al., McMichael v....	464
Romney and Tilbury West et al., In re Townships of ....	477	Wills, Paisley v .....	210
S.		Wood v. Joselin .....	59
Sawyer v. Pringle .....	218	Wright v. Bell.....	25
Sawyer v. Thomas .....	129		



# TABLE

## OF THE

### NAMES OF CASES CITED IN THIS VOLUME.

#### A.

Names of Cases Cited.	Where Reported.	Page of Vol.
Acebal v. Levy .....	10 Bing. 376 .....	230
Acey v. Ferney .....	7 M. & W. 151 .....	338, 340
Addie's Charity, Ex parte .....	3 Ha. 22 .....	397
Adey v. Trinity House, In re .....	17 Jur. 489 .....	403
Agency Co. v. Short .....	13 App. Cas. 793 .....	68, 92
Agra and Masterman's Bank, In re .....	L. R. 2 Ch. 391 .....	241
Ahrens v. McGilligat .....	23 C. P. 171 .....	408
Albert v. Baltimore .....	2 Md. 159 .....	310
Allcard v. Skinner .....	36 Ch. D. 145 .....	601, 606, 611
Almada Tirito Co., In re .....	38 Ch. D. 514 .....	660
Ambrose v. Fraser .....	14 O. R. 551 .....	471, 475
Ancaster, Corporation of, v. Durrand ..	32 C. P. 563 ..288, 291, 293, 294, 295,	300, 304
Angerstein v. Martin .....	T. & R. 241 .....	390
Anstee v. Nelms .....	1 H. & N. 225 .....	45
Armstrong v. Morrill .....	14 Wall. 138 .....	36
Ashbury etc. Co. v. Riche .....	L. R. 7 H. L. 653 .....	456, 460
Ashley v. Brown .....	17 A. R. 500 .....	161
Attorney-General v. Cleaver .....	18 Ves. 211 .....	454
Attorney-General v. Cockermonth Local Board .....	L. R. 18 Eq. 172 .....	454, 455
Attorney-General v. Ely, Haddenham and Sutton R. W. Co. ....	L. R. 4 Ch. 194 .....	454, 458
Attorney-General v. Gee .....	L. R. 10 Eq. 131 .....	454
Attorney-General v. Great Eastern R. W. Co .....	11 Ch. 10, 449; 5 App. Cas. 473 454, 455, 456, 457, 458, 460, 461	
Attorney-General v. Great Northern R. W. Co. ....	1 Dr. & Sm. 154 .....	454, 458
Attorney-General v. Mayor of Kingston. ....	34 L. J. Ch. 481 .....	454
Attorney-General v. Mid Kent R. W. Co. ....	L. R. 3 Ch. 100 .....	454
Attorney-General v. Munro .....	2 DeG. & D. 122 .....	40
Attorney-General v. Shrewsbury Bridge Co .....	21 Ch. D. 752 .....	454, 455, 462
Attorney-General v. Tomline .....	5 Ch. D. 750 .....	626, 628
Attrill v. Huntingdon .....	70 Md. 191 .....	139, 155
Austen v. Story .....	10 Grant 306 .....	356, 357, 369
Aylesford, Earl of v. Morris .....	L. R. 8 Ch. 484 .....	362

#### B.

Bailey v. Boderham .....	16 C. B. N. S. 288 .....	134
Baines Case .....	16 A. R. 237 .....	209, 470
Baker v. Bulstrode .....	2 Lev. 95 .....	425

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Baker v. Nottingham Banking Co.....	7 Times L. R. 235.....	312, 331
Baldwin v. Kingstone .....	16 O. R. 341 .....	63
Banglay, Ex parte .....	1 Rose 168.....	362, 365
Bank of Montreal v. Gilchrist.....	6 A. R. 659 .....	414
Bank of Montreal v. Sweeney.....	12 App. Cas. 617 ....	310, 311, 317, 326
Bassett v. Nosworthy .....	2 W. & T. L. C. 6th ed. 1.....	330
Bate v. Canadian Pacific R. W. Co....	15 A. R. 388 .....	189
Batthyany v. Walford .....	36 Ch. D. 269 .....	139
Battle v. Speight .....	9 Ired. 288 .....	71, 88
Bayard v. Farmers' and Mechanics' Bank	52 Pa. St. 232 .....	310
Beatty v. Davis .....	20 O. R. 373 .....	413
Beauchamp, Earl, v. Winn .....	L. R. 6 H. L. 223 ..	63, 72, 81, 95, 108
Bell v. Nixon .....	9 Bing. 393 .....	295
Belshaw v. Bush.....	11 C. B. 205 .....	131
Bennett v. Covert .....	24 U. C. R. 38 .....	288
Bessala v. Stern .....	2 C. P. D. 265.....	170, 172, 178
Beswick v. Swindells.....	5 B. & Ad. 914.....	422
Bidder v. Bridges .....	37 Ch. D. 406.....	137
Birch, In re .....	15 C. B. 743 .....	414
Birkett v. McGuire .....	7 A. R. 53.....	372, 376
Bishop v. Rowe .....	3 M. & S. 362 .....	133
Blades v. Higgs .....	12 C. B. N. S. 501, 11 H. L. C. 621.	409
Bland v. Andrews .....	45 U. C. R. 431.....	408, 411
Board v. Board .....	L. R. 9 Q. B. 48.....	35, 39, 43
Bolling v. Hobday .....	31 W. R. 9 .....	94, 95
Bones v. Booth .....	2 W. Bl. 1226 .....	155
Bottomley v. Nuttall.....	5 C. B. N. S. 148 .....	131
Bowen, In re .....	21 L. J. Q. B. 10 .....	408
Bower v. Peate .....	1 Q. B. D. 321.....	292
Bowes v. Holland .....	14 U. C. R. 316.....	146
Boyd, In re .....	15 L. R. Ir. 321 .....	164
Bradshaw v. Duffy.....	4 P. R. 50 .....	414
Branksea Island Co., In re .....	1 Meg. 23 .....	661
Braunstein v. Lewis .....	7 Times L. R. 566 .....	470
Brewer v. Broadwood .....	22 Ch. D. 105.....	212
Bridge Proprietors v. Hoboken Co.....	1 Wall. 116 .....	627
Briggs v. Massey .....	42 L. T. N. S. 49 .....	309
British Canadian Loan and Investment Co. and Ray, Re.....	16 O. R. 15.....	249
Broad v. Perkins .....	21 Q. B. D. 533 .....	414
Broadbent v. Ramsbotham .....	11 Exch. 602 .....	505
Brown v. Cayuga R. W. Co.....	12 N. Y. 486 .....	193
Brown v. Cocking .....	L. R. 3 Q. B. 672 .....	408
Browne, Re .....	2 Gr. 111, 590 .....	373
Bryant, In re .....	44 Ch. D. 218 .....	212, 213
Buckbee v. United States Ins. Co.....	18 Barb. 541 .....	341
Burgess v. Seligman .....	107 U. S. 20.....	146
Burkinshaw v. Nicolls.....	3 App. Cas. 1004.....	669
Burn v. Burn .....	8 O. R. 237 .....	168
Burns v. McKay.....	10 O. R. 167 .....	160, 164
Bushell v. Moss, Re .....	11 P. R. 252 .....	418
Butcher v. Stead.....	L. R. 7 H. L. 839.....	162, 165
Butler v. Wearing .....	17 Q. B. D. 182.....	61

## C.

Cameron v. Allen .....	10 P. R. 192 .....	122
Cameron v. Kerr.....	3 A. R. 30.....	380, 381
Camidge v. Allenby .....	6 B. & C. 373 .....	134

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Campbell v. Robinson .....	27 Ga. 634 .....	472, 473
Canada Permanent Building Society v. Teeter .....	19 O. R. 156 .....	249
Canada Permanent Loan and Savings Co. v. McKay .....	32 C. P. 51.....	93
Cann v. Cann .....	1 P. Wms. 567.....	70
Capron v. Capron .....	L. R. 17 Eq. 288.....	70
Carmarthen R. W. Co v. Manchester R. W. Co .....	L. R. 8 C. P. 685.....	134
Carr v. Fire Assurance Association .....	14 O. R. 487 .....	354
Carrol v. Carrol .....	16 How. 275.....	71, 88
Carter v. White .....	25 Ch. D. 666.....	133
Carty v. City of London .....	18 O. R. 122 .....	292
Castor v. Township of Uxbridge.....	39 U. C. R. 113.....	293
Castrique v. Imrie .....	L. R. 4 H. L. 414 .....	138
Central Bank, In re, Nasmith's Case....	16 O. R. 293; 25 C. L. J. 238 .....	209
Chamley v. Lord Dunsany .....	2 Sch. & L. 718 .....	473
Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co	10 Q. B. D. 521.....	151
Chatterton v. Watney .....	17 Ch. D. 259.....	60
Cheetham v. Hampson .....	4 T. R. 318 .....	194
Chew v. Holroyd .....	8 Exch. 249 .....	403
Child v. Hudson Bay Co .....	2 P. W. 207.....	575
Chinery v. Viall .....	5 H. & N. 288.....	229
Chisholm v. Oakville .....	12 A. R. 225 .....	409
Cholmondely v. Clinton.....	2 J. & W. 148 .....	17
Chorlton v. Lings .....	L. R. 4 C. P. 384.....	15
Citizens' Insurance Co. v. Parsons.....	7 App. Cas. 108 .....	576
City Discount Co. McLean .....	L. R. 9 C. P. 692.....	372, 374, 376, 379, 381
Clark v. Harvey .....	16 O. R. 159 .....	247, 249
Clayton's Case.....	1 Mer. 572 .....	376, 379, 382
Clement v. Canfield .....	28 Vt. 304 .....	194
Clowes v. Higginson .....	1 V. & B. 527 .....	239
Cockburn v. Edwards .....	18 Ch. D. 449 .....	359, 369
Coggs v. Bernard.....	1 Sm. L. C. 9th ed. 201 .....	236
Cohen v. Hale .....	3 Q. B. D. 371.....	131
Cole v. Manning .....	2 Q. B. D. 611.....	169, 172, 178
Colonial Bank of Australasia v. Willian..	L. R. 5 P. C. 417.....	405, 409
Cooke v. Eshelby .....	12 App. Cas. 271 .....	311, 320
Combined Weighing and Advertising Co., In re .....	43 Ch. D. 99 .....	60
Commercial Bank v. Wilson .....	3 E. & A. R. 257.....	646, 651, 657
Commins v. Scott .....	L. R. 20, Eq. 11 .....	212
Commissioners of Inland Revenue v. Angus .....	23 Q. B. D. 579.....	4
Constable v. Constable .....	11 Ch. D. 681 .....	70, 103
Cooper v. Phibbs .....	L. R. 2 H. L. 148.....	63, 72, 98, 108
Corham v. Kingston .....	17 O. R. 432.....	347, 348, 350, 366, 369
Cornwell v. Commissioners of Sewers..	10 Exch. 771 .....	194
Corser v. Cartwright.....	L. R. 7 H. L. 731 .....	398
Costello v. Hunter .....	12 O. R. 333 .....	168, 177
Coupland v. Hardingham .....	3 Camp. 397.....	195
Cozier, Re, Parker v. Glover .....	24 Gr. 539 .....	475
Crawcour, Ex parte .....	9 Ch. D. 419 .....	233
Croft v. Graham.....	2 DeG. J. & S. 155.....	362
Crysler v. Township of Sarnia.....	15 O. R. 180 .....	260
Culley v. Taylerson .....	11 A. & E. 1008 .....	95, 106
Cundy v. Lindsay .....	3 App. Cas. 459 .....	318
Currie v. Misa.....	T. R. 10 Exch. 153.....	131



## D.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Danaher v. Peters .....	17 S. C. R. 44 .....	575
Daniell v. Sinclair .....	6 App. Cas. 181 .....	377
Dark v. Johnston .....	55 Pa. St. 164 .....	628
Dawson v. Prince .....	2 De G. & J. 49 .....	318
De Bode's, Baron, Case.....	8 Q. B. 208 .....	149
Delves v. Delves.....	L. R. 20 Eq. 77 .....	125
Dennick v. Railroad Company .....	103 U. S. 11.....	155
Dent v. Bennett .....	4 M. & W. 276 .....	600
Denys v. Shucksburgh .....	4 Y. & C. Exch. 42 .....	72, 78, 97, 106
Dermani v. Home Mutual Ins. Co .....	26 La. Ann. 69 .....	448
Devine v. Griffin.....	4 Gr. 603 .....	239
Dillion v. Township of Raleigh .....	13 A. R. 53 .....	263
Dillon, In re, Duffin v. Duffin.....	44 Ch. D. 76 .....	180
Ditchell v. Spuyten Duyvil R. W. Co..	67 N. Y. 425 .....	194
Dobie v. Temporalities Board .....	7 App. Cas. 136 .....	576
Doe d. Chidgey v. Harris.....	16 M. & W. 524.....	37, 38
Doe Perry v. Henderson .....	3 U. C. R. 486.....	537
Doe dem. Sams v. Garlick .....	14 M. & W. 698 .....	90
Douglas v. Forrest .....	4 Bing. 704 .....	55
Dover v. Chatham .....	11 A. R. 242; 12 S. C. R. 321.....	480, 526
Dudley Settled Estates, In re .....	25 and 26 Solrs. Jour. 359.....	626, 631
Duncan v. Jaudon .....	15 Wall. 165 .....	310
Dunham v. Kirkpatrick .....	101 Pa. St. 36 .....	626

## E.

Ellis v. Emmanuel.....	1 Ex. D. 157....	559, 561, 563, 565, 566, 567, 568, 570, 571
Elston v. Rose.....	L. R. 4 Q. B. 4. ....	402, 404, 406, 408, 409
Elwes v. Briggs Gas Co.....	33 Ch. D. 562 .....	626
Emmett v. Quinn .....	7 A. R. 306 .....	251
English v. Mulholland .....	9 P. R. 145 .....	414
Enraght v. Lord Penzance .....	7 App. Cas. ....	408
Essex and Rochester, Re .....	42 U. C. R. 523.....	477, 480, 481
Evans v. Sutton, In re .....	8 P. R. 367 .....	408

## F.

Fenton v. Blackwood.....	L. R. 5 P. C. 167 ..	379, 380, 381, 382
Fergus v. Wilmarth .....	7 N. E. Rep. 508.....	355
Field v. Rice, Re.....	20 O. R. 309 .....	408
Finch, In re, Finch v. Finch .....	23 Ch. D. 277.....	168, 179
First National Bank of Plymouth v. Price.	33 Md. 487 .....	139, 155
Fliteroft's Case .....	21 Ch. D. 519.....	660
Flash v. Conn .....	109 U. S. 371 (1883).....	139, 140
Foley v. Foley .....	26 Gr. 463 .....	68
Folliott v. Ogden .....	1 H. Bl. 123 .....	138, 139, 141, 153, 154
Forbes & Co. v. Border Counties Fire Office	11 Ct. of Sess. Cas. 3rd Series 298..	449
Forrer v. Nash.....	35 Beav. 167 .....	211, 212
Forrester v. Grant .....	17 Gr. 379 .....	239
Foulk v. McFarlane .....	1 Watts & Serg. 297 .....	125
Fraser v. Fraser .....	14 C. P. 70.....	68
Fredericton v. The Queen.....	3 S. C. R. 505.....	575, 577, 591
Freeth v. Barr .....	L. R. 9 C. P. 208 .....	225
French v. Campbell .....	2 H. Bl. 163 .....	424
Frontenac, Corporation of, v. Chestnut..	9 U. C. R. 365 .....	303
Frye v. Milligan.....	10 O. R. 509 .....	233

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Fuller v. Abrahams .....	3 Brod. & B. 116.....	125
Funk v. Haldeman.....	53 Pa. St. 229 .....	628

## G.

Gage v. Scales .....	100 Ill. 218.....	5
Gallagher's Executors v. Roberts .....	2 Wash. C. C. R. 191.....	133
Garland v. Beverley .....	9 Ch. D. 213 .....	71, 73, 85
Gartshore v. Charlie .....	10 Ves. 13 .....	390
Gaston v. American Exchange Bank ....	29 N. J. Eq. 98.....	310
Geddis v. The Proprietors of the Bann Reservoir .....	3 App. Cas. 430 .....	259
Gilbert v. Hoffman.....	2 Watts 66 .....	127
Gilchrist and Island, In re .....	11 O. R. 537 .....	247, 249, 261
Gilmore v. Shooter. ....	2 Mod. 310 .....	71
Godard v. Gray .....	L. R. 6 Q. B. 139.....	138, 157
Goodwin v. Gray.....	22 W. R. 312.....	565
Gordon v. Ware Savings Bank.....	115 Mass. 588 .....	355
Graham v. Spettigue .....	12 A. R. 261 .....	414
Grand Trunk R. W. Co. v. Rosenberger..	9 S. C. R. 311..184, 187, 196, 197, 198, 202, 206	
Grassick v. City of Toronto.....	39 U. C. R. 304 .....	261, 292
Gray v. Pullen .....	5 B. & S. 970 .....	293
Green v. Hewer .....	21 C. P. 531.....	356, 369
Grey v. Seckham.....	L. R. 7 Ch. 680 .....	560
Groves v. Groves.....	10 Q. B. 486 .....	68

## H.

Hadley v. London Bank of Scotland ....	3 D. J. & S. 63 .....	22
Hall v. Smith .....	14 Ves. 426.....	56
Hall v. Warren .....	9 Ves. 605.....	243
Halley, The .....	L. R. 2 P. C. 193 .....	151
Hamilton v. Covert.....	16 C. P. 205 .....	288
Hare v. Henty .....	10 C. B. N. S. 85 .....	134
Harkness v. Russell.....	118 U. S. 163.....	220, 223, 233
Harman v. Richards .....	10 Hare 81.....	637, 641, 649, 654
Harris v. Mudie .....	7 A. R. 420 .....	544
Harrison v. MacL'Meel.....	50 L. T. N. S. 210.....	487
Hart v. Chicago R. W. Co.....	7 N. W. Rep. (Iowa) 9.....	198
Harty v. Central R. W. Co.....	3 Hand. (42 N. Y.) 468.....	198
Harty v. Gooderham.....	31 U. C. R. 18 .....	245
Harwich and Raleigh, Re Townships of..	20 O. R. 154 .....	477, 480
Hasluck v. Pedley .....	L. R. 19 Eq. 271..70, 76, 87, 103, 112	
Hawksbee v. Hawksbee .....	11 Ha. 230 .....	45
Head's Trustees, In re .....	45 Ch. D. 310.....	213
Heath v. Crealock .....	L. R. 10 Ch. 22 .....	332
Henderson, In re, Nouvion v. Freeman..	37 Ch. D. 244.....	137
Henderson v. Henderson .....	6 Q. B. 298 .....	137
Henniker v. Wigg .....	4 Q. B. 792 .....	372, 379
Hewison v. City of New Haven .....	34 Conn. 142 .....	273
Hext v. Gill .....	L. R. 7 Ch. 699 .....	627, 628, 630
Heywood v. Pickering .....	L. R. 9 Q. B. 428.....	131, 134
Hickey v. Campion .....	20 W. R. 752 .....	169
Hinckley v. Gildersleeve .....	19 Grant 12.....	288
Hine v. Roberts .....	48 Conn. 267 .....	220, 224
Hixon v. City of Lowell .....	13 Gray 59 .....	291
Hobbs, In re, Hobbs v. Wade.....	36 Ch. D. 553.....	67, 77, 79, 93
Hobson v. Bass .....	L. R. 6 Ch. 792 .....	561, 566

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Hodge v. The Queen .....	9 App. Cas. 130 .....	576, 588
Hodges v. Bennett .....	5 H. & N. 625 .....	179
Hoffman v. Aetna Fire Ins. Co. ....	32 N. Y. 415 .....	448
Hoggart v. Scott .....	1 R. & M. 293 .....	211
Holburne, Re, Coates v. MacKillop ....	53 L. T. N. S. 212 .....	4
Holdipp v. Otway .....	2 Saund. 102 .....	424
Hole v. Sittingbourne and Sheerness R. W. Co .....	6 H. & N. .... 262, 289, 291, 292, 300	
Hooper v. Clark .....	L. R. 2 Q. B. 200 .....	409, 412
Hooper v. Keay .....	1 Q. B. D. 170 .....	373
Hope, Ex parte .....	3 M. D. & D. 720 .....	569
Hope v. Grant .....	20 O. R. 623 .....	656
Hopkins v. Ware .....	L. R. 4 Exch. 68 .....	132, 133, 134
Horwell v. London General Omnibus Co.	2 Exch. D. 365 .....	473
Howe v. Smith .....	27 Ch. D. 92 .....	392, 394
Hughes v. Percival .....	8 App. Cas. 443 .....	292
Huguenin v. Basely .....	2 W. & T. L. C. 6th ed. 597. 600	607, 608, 611
Hunter v. Atkins .....	3 M. & K. 140 .....	600
Huron, Corporation of, v. Kerr .....	15 Gr. 265 .....	304
Hussey v. Moore .....	Cro. Jac. 413 .....	141, 142
Hynes v. Smith .....	27 Grant 150 .....	277

## I.

Illinois Central R. W. Co. v. Kanouse ..	39 Ill. 272 .....	194
Imray v. Magnay .....	11 M. & W. 269 .....	127
Inland Revenue, Commissioners of, v. Angus .....	23 Q. B. D. 579 .....	4, 7, 9, 17, 23
Insurance Co. v. Eggleston .....	96 U. S. 572 .....	341
Insurance Co. v. Wolff .....	95 U. S. 333 .....	342
Ireland v. Guess .....	3 U. C. R. 220 .....	304
Ireland v. Noble .....	3 U. C. R. 235 .....	304
Irwin v. Young .....	28 Gr. 511 .....	612

## J.

Jacobs v. Seward .....	L. R. 5 H. L. 464 .....	69
James v. Kerr .....	40 Ch. D. 459 .....	362
Jarrett v. Hunter .....	34 Ch. D. 182 .....	239
Jersey, Earl, v. Neath .....	22 Q. B. D. 555 .....	627, 628
Johnson, Re, Golden v. Gilliam .....	20 Ch. D. 389 .....	641, 654
Johnson v. Hope .....	17 A. R. 10. 159, 160, 161, 164, 165, 166	
Johnson v. Therrien .....	12 P. R. 442 .....	403
Johnston's Appeal .....	15 Morrison's Mining Reports 556 ..	628
Jones v. Gibbons .....	9 Ves. 410 .....	324
Jones v. Grand Trunk R. W. Co .....	16 A. R. 37 .....	219
Jones v. Corporation of Liverpool .....	14 Q. B. D. 890 .....	261, 291
Jones v. Ogle .....	L. R. 8 Ch. 192. .... 71, 74, 87, 102, 103	

## K.

Keefe v. McLennan .....	2 Russell & Ches. 5 .....	575
Keeney v. Home Ins. Co. ....	7 Ins. L. J. 100 .....	449
Kemp, Ex parte .....	L. R. 9 Ch. 383 .....	350
Kennedy v. Freeman .....	15 A. R. 223 .....	163, 165
Kenrick v. Kenrick .....	4 Hagg. 114 .....	171
Kernaghan v. McNally .....	12 Ir. Ch. R. 89 .....	42



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Kerr v. Corporation of Preston .....	6 Ch. D. 463 .....	454
Kidderminster, Mayor of, v. Hardwick..	L. R. 9 Exch. 13.....	304
Kier v. Peterson .....	41 Pa. St. 357 .....	628
Kilby v. Haggin .....	3 J. J. Marsh. 208 .....	127
King, The, v. The Sheriff of York.....	3 B. & Ad. 770.....	575
Kingsmill v. Warrener .....	13 U. C. R. 18 .....	138
Kinnaird v. Trollope.....	39 Ch. D. 636.....	471
Kintore v. Kintore.....	11 App. Cas. 394 .....	72
Knox v. Gye .....	L. R. 5 H. L. 656 .....	16

## L.

Lamb v. Young .....	19 O. R. 104 .....	160
Lamond v. Davall .....	9 Q. B. 1030 .....	220, 226, 230
Lansdowne v. Lansdowne.....	2 J. & W. 205 .....	70, 82
Lawrence v. Lawrence .....	26 Ch. D. 795.....	70, 88
Laws v. Rand .....	3 C. B. N. S. 442 .....	133
Leak v. Driffeld .....	24 Q. B. D. 98 .....	470
Lees v. Whitely .....	L. R. 2 Eq. 143 .....	355
Le Neve v. Le Neve .....	2 W. & T. L. C. 6th ed., p. 45. ....	329, 330
Levy v. Herbert .....	7 Taunt. 314, 1 J. B. Moore 56....	425
Lichfield Union v. Green .....	1 H. & N. 884.....	134
Liquor License Act, 1883, In re .....	Cassels' Digest 279.....	575
Lister v. Pickwood.....	34 Beav. 576.....	41, 56, 68
Little Miami R. W. Co. v. Commissioners	31 Ohio St. 338 .....	194
Lockie v. Tennant .....	5 O. R. 52 .....	473
Loomis v. Bragg .....	50 Conn. 228 .....	220, 225
Long v. Storey.....	9 Ha. 542 .....	365
Lowther v. Heaver.....	41 Ch. D. 248 .....	4
Lyell v. Kennedy .....	14 App. Cas. 437 .....	536
Lynch v. Government of Paraguay .....	L. R. 2 P. & D. 268 .....	139
Lysaght v. Edwards .....	2 Ch. D. 509 .....	22

## M.

Macfie v. Hutchinson, Re.....	12 P. R. 167 .....	408
Maclean v. Dunn.....	4 Bing. 722 .....	230
Mainlands v. Upjohn.....	41 Ch. D. 126 .....	363
Maltby v. Chicago Railway .....	13 E. & Am. Ry. Cases 606 .....	191
March, In re, Mander v. Harris .....	24 Ch. D. 222, 27 Ch. D. 166.....	71, 74 87, 103
Markham v. Stanford.....	14 C. B. N. S. 376 .....	304
Martin v. Holgate .....	L. R. 1 H. L. 175 .....	49, 58
Martineau v. Kitching .....	L. R. 7 Q. B. D. 450 .....	223
Mason v. Bickle .....	2 A. R. 291 .....	233
Mason v. Johnson .....	27 C. P. 208 .....	233
Medcalfe v. Widdifield .....	12 C. P. 411 .....	443
Merchants' Bank v. Bliss .....	35 N. Y. 412 .....	139
Merchants' Bank v. Moffatt.....	5 O. R. 122 .....	380
Mersey Docks and Harbour Co. v. Pen- hallow, et al.....	7 H. & N. 329.....	293
Mersey Steel Company v. Naylor .....	9 App. Cas. 443 .....	225
Middleton v. Pollock.....	2 Ch. D. 104 .....	641
Midland Banking Co. v. Chambers.....	L. R. 4 Ch. 398 .....	569
Midland Railway v. Haunchwood .....	20 Ch. D. 552.....	628
Midland Railway v. Robinson.....	37 Ch. D. 386, 15 App. Cas. 19....	628
Midland & Great Western Railway of Ireland v. Johnson.....	6 H. L. C. 798.....	70, 109
Miles, Ex parte .....	1 DeG. 623.....	569

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Miles v. New Zealand Co. ....	32 Ch D. 266 .....	660, 664
Milissich v. Lloyds .....	36 L. T. N. S. 423 .....	208
Miner v. Gilmour .....	12 Moo. P. C. 156 .....	505
Minneapolis Harvester Works v. Halley	27 Minn. 495 .....	220, 225
Mitchell v. Homfray .....	8 Q. B. D. 507 .....	606, 612
Molson's Bank v. Haltor .....	16 A. R. 323 ; S. C. R. 1891 ..	159,
	160, 161, 164, 165, 635, 636, 640,	656
Monck v. Stewart .....	4 U. C. R. 203 .....	425
Moore v. Gamgee .....	25 Q. B. D. 244 .....	414
Moreton v. Hopkins .....	2 Sid. 407 .....	142
Munday v. Asprey .....	13 Ch. D. 855 .....	239
Murphy v. Murphy .....	15 Ir. C. L. R. 205 .....	95, 106
Murphy v. City of Ottawa .....	13 O. R. 334 .....	291

## Mc.

McArthur v. McArthur .....	14 U. C. R. 544 .....	68
McCall v. Chamberlain .....	13 Wis. 713 .....	194
McCracken v. McIntyre .....	1 S. C. R. 479 .....	661, 668, 669
McCreight v. Foster .....	L. R. 5 Ch. 604 .....	4, 16
McDonald v. Snitsinger .....	5 U. C. R. 312 .....	425
McDonell v. McKinty .....	10 Ir. L. R. 514 .....	91
McGowan v. Middleton .....	11 Q. B. D. 464 .....	281
McKenzie v. Ryan, In re .....	6 P. R. 323 .....	414
McKinnon v. McDonald .....	11 Gr. 432 .....	68
McLeod v. Emigh, Re .....	12 P. R. 450 .....	403
McVean v. Tiffin .....	13 A. R. 1 .....	271, 277

## N.

Nasmith's Case .....	18 A. R. 209 .....	491
National Mutual Benefit Association v. Jones .....	84 Kent 110 .....	342
National Provincial Bank, Re .....	17 Ch. D. 98 .....	569
Neal v. Briggs .....	12 Ga. 104 .....	138, 154
Needham, Anne, In re .....	1 J. & L. 34 .....	39
Neesom v. Clarkson .....	2 Ha. 163 .....	56
Nelles v. Paul .....	4 A. R. 1 .....	655, 656
Nelson, Earl, v. Lord Bridport .....	8 Beav. 527 .....	150
Nelson v. Vermont and Canada R. W. Co.	26 Vt. 721 .....	194
Nordheimer v. Robinson .....	2 A. R. 305 .....	22, 23
North Australian Territory Co. (Lim.), Re	64 L. T. R. N. S. 140, 91 L. T. 393 ..	600
Northampton, Marquess of, v. Pollock ..	45 Ch. D. 190 .....	363
Northwood v. Keating .....	18 Gr. 643 .....	135

## O.

Orford and Howard, In re .....	18 A. R. 496 .....	521, 523, 524, 528
Orr v. Orr .....	31 U. C. R. 13 ; 21 Gr. 397 .....	68, 180
Osborne, Ex parte .....	10 Ch 47 .....	364
Owens v. Quebec Bank .....	30 U. C. R. 382 .....	133

## O'.

O'Brien v. Irving .....	7 P. R. 308 .....	414
O'Donnell v. Providence and Worcester R. W. Co. ....	6 R. I. 211 .....	198
O'Reilly qui tam v. Allan .....	11 U. C. R. 526 .....	443

## P.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Padstow Total Loss and Collision Assurance Association, In re .....	20 Ch. D. 137.....	409
Page v. Austin .....	10 S. C. R. 132 .....	660, 668
Page v. Cowasjee Eduljee.....	L. R. 1 P. C. 127 .....	220, 229
Paine v. Jones.....	L. R. 18 Eq. 320 .....	35, 42, 43, 54, 69
Paisley v. Wills .....	19 O. R. 303 .....	210
Paley v. Field .....	12 Ves. 435 .....	569
Palliser v. Gurney .....	19 Q. B. D. 519.....	469
Parfitt v. Lawless .....	L. R. 2 P. & D. 462 .....	610
Parker v. Parker .....	32 C. P. 113 .....	167, 168, 173, 180
Patterson v. Holland.....	6 Gr. 414, 7 Gr. 1 .....	146
People, The, v. Chicago and Alton R. W. Co .....	67 Ill. 118 .....	193
People v. N. Y. Central R. W. Co.....	25 Barb. 199 .....	198
Persse v. Persse .....	3 Ir. Ch. R. 196 .....	45
Peters v. Anderson .....	5 Taut. 596 .....	372
Phillips v. Eyre .....	L. R. 6 Q. B. D. 1 .....	151
Pierce v. Concord R. W. Co.....	51 N. H. 590 .....	194
Pike v. Fitzgibbon .....	17 Ch. D. 462 .....	475
Pilcher v. Rawlins .....	L. R. 7 Ch. 259 .....	333, 334
Plomley v. Shepherd.....	64 L. T. N. S. 94 .....	388
Polley v. Polley .....	31 Beav. 363 .....	50
Pordage v. Cole .....	1 Wms. Saund. 548 .....	225
Potter v. Duffield .....	L. R. 18 Eq. 4.....	239
Potter v. Edwards .....	26 L. J. Ch. 468 .....	363
Powers v. Guardian Fire and Life Ins Co.....	136 Mass. 108 .....	448
Pratt v. City of Stratford.....	16 A. R. 5 .....	265
Preston v. Corporation of Camden.....	14 A. R. 85.....	265
Price v. Cataraqui Bridge Co .....	35 U. C. R. 314.. 287, 290, 291, 295, 300, 301	
Prideaux v. Criddle .....	L. R. 4 Q. B. 455.....	134
Prince v. Oriental Bank Corporation...	3 App. Cas. 325 .....	134
Prindle v. McCan.....	4 U. C. R. 228.....	425
Provost, etc., of Glasgow, Lord, v. Fairie.	13 App. Cas. 657 .....	627, 628, 630
Pullen v. Ready ..	2 Atk. 517.....	76

## Q.

Queen, The, v. Justices of Kings.....	2 Pugsley 535 .....	577
Queen v. Judge of the County Court of Lincoln .....	20 Q. B. D. 167.....	409
Queen, The, v. Taylor .....	36 U. C. R. 183.....	577
Quick v. Quick .....	21 N. J. Eq. 13.....	88, 104

## R.

Rafael v. Verelst .....	2 W. Bl. 1055.....	153, 154
Raikes v. Todd .....	8 A. & E. 846 .....	569
Rains v. Buxton.....	14 Ch. D. 537 .....	92
Randall v. Baltimore R. W. Co .....	109 U. S. 478 .....	198
Rawlings, Ex parte .....	22 Q. B. D. 193.....	233
Rawstron v. Taylor .....	11 Exch. 369 .....	505
Rayner v. Preston.....	18 Ch. D. 1 .....	9, 16
Reading v. Rawsterne .....	2 Ld. Raymond 829; 2 Salk. 423. 68, 80, 92, 93, 105	
Redpath v. Kolfage .....	16 U. C. R. 433.....	131
Regina v. Bannerman .....	43 U. C. R. 547 .....	169, 177

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Regina v. Battle Union.....	L. R. 2 Q. B. 8 .....	409
Regina v. Boyes .....	.....	177
Regina v. Caister .....	30 U. C. R. 247.....	303
Regina v. Dobbins .....	48 J. P. 182 .....	485, 486, 487
Regina v. Essery .....	7 P. R. 290 .....	414
Regina v. Farler .....	8 C. & P. 108 .....	174
Regina v. Geddington .....	2 B. & C. 129 .....	15
Regina v. Judge of County Court of Lincolnshire.....	20 Q. B. D. 167 .....	402, 404
Regina v. Llantillio .....	5 B. & C. 461 .....	12, 15
Regina v. Long Bennington.....	2 B. & C. 152 .....	15
Regina v. Read .....	9 A. & E. 619 .....	179
Regina v. Taylor .....	36 U. C. R. 183.....	576
Regina v. Train .....	3 F. & F. 22.....	292
Regina v. Train et al.....	2 B. & S. 640 .....	191
Regina v. United Kingdom Electric Tele- graph Co .....	9 Cox 174.....	190
Regina v. Watts .....	1 Salk. 357 .....	194
Reinhart v. Shutt .....	15 O. R. 325 .....	277
Reuss v. Pickering.....	L. R. 1 Exch. 353 .....	245
Rex v. Addis .....	6 C. & P. 388 .....	175
Rex v. Geddington.....	2 B. & C. 129 .....	40
Rex v. Llantillio .....	5 B. & C. 461 .....	40
Rex v. Westwood .....	4 B. & C. 786 .....	575
Reynolds v. Offitt .....	3 U. C. L. J. 169 .....	403
Rhodes v. Bate .....	L. R. 1 Ch. 152.....	606, 621
Rice v. Field, Re .....	20 O. R. 309 .....	414
Riggs v. Commercial Mutual Ins. Co....	51 N. Y. Sup. 466 .....	448
River Stave Co. v. Sill .....	12 O. R. 557 .....	160
Robertson v. Holland .....	16 O. R. 532 .....	160
Robinson v. Hawksford .....	9 Q. B. 52.....	133
Robson v. Oliver.....	10 Q. B. 704; 11 Jur. 1056; 16 L. J. Q. B. 437.....	134
Rogers v. Ingham .....	3 Ch. D. 351....63, 68, 70, 82, 98, 110	
Rose-Belford Printing Co. v. Bank of Montreal .....	12 O. R. 544 .....	134
Rose v. Peterkin.....	13 S. C. R. 677.....	239
Rose v. Watson .....	10 H. L. C. 672 .....	18, 22
Rosenberger v. Grand Trunk R. W. Co.	8 A. R. 432, 9 S. C. R. 311..184, 187, 191, 197, 198, 202, 206	
Rosewell v. Prior.....	2 Salk. 460 .....	194
Ross v. Hunter .....	7 S. C. R. 314.....	54
Rossiter v. Miller .....	3 App. Cas. 1124.....	239, 241
Rushworth, Ex parte .....	10 Ves. 409.....	568, 569
Russell v. Jones .....	13 M. & W. 633 .....	157
Russell v. The Queen .....	7 App. Cas. 829....575, 576, 581, 587, 588, 589	
Russell v. Romanes .....	3 A. R. 635 .....	211
Russell v. Smyth .....	9 M. & W. 819 .....	157
Ryan v. McConnell .....	18 O. R. 409 .....	134
Ryan v. Ryan .....	5 S. C. R. 387.....	537, 538

## S.

Sadler v. South Staffordshire Steam Tram- way Co .....	23 Q. B. D. 17 .....	202
Saull v. Brown .....	L. R. 10 Ch. 64 .....	454
Scanlon v. Union Fire Ins. Co .....	4 Biss. 511 .....	448
Schibsby v. Westenholz .....	L. R. 6 Q. B. 155.....	151, 157



NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Scott v. Mayor of Manchester.....	2 H. & N. 204 .....	291
Scott v. Morley .....	20 Q. B. D. 126 .....	470
Seaman v. Enterprise.....	18 Fed. Rep. 250 .....	291
Seney v. Porter .....	12 Gr. 546 .....	474
Serle v. Norton .....	2 Moo. & R. 401.....	133
Seton v. Slade.....	7 Ves. 274.....	4, 14, 22
Severn v. The Queen.....	2 S. C. R. 70 .....	576
Shakespeare, In re, Deakin v. Lakin ....	30 Ch. D. 169 .....	469
Shaw v. Foster .....	L. R. 5 H. L. 321 .....	16, 17, 21, 22
Shaw v. Spencer.....	100 Mass. 382 .....	310
Shaw v. Thackeray .....	1 Sm. & G. 537.....	239, 246
Sheffield, Earl of, v. London Joint Stock Bank .....	13 App. Cas. 333... 311, 312, 314, 315, 319, 328, 331	
Shepherd v. Hodsman .....	18 Q. B. 316 .....	304
Shrapnel v. Vernon .....	2 B. C. C. 268 .....	17
Sibbald v. Grand Trunk R. W. Co.....	19 O. R. 164 .....	184
Siddal v. Gibson.....	17 U. C. R. 98 .....	402, 408, 411
Siggers v. Evans.....	5 E. & B. 367 .....	34
Simmons v. London Joint Stock Bank ..	63 L. T. N. S. 789..311, 312, 314, 328, 331	
Simmons v. Simmons .....	11 Jur. 830; 1 Rob. Ecc. R. 566 ..	170
Sims v. Kelly, Re .....	20 O. R. 291.....	414
Simson v. Ingham .....	2 B. & C. 65.....	372
Slater v. Oliver .....	7 O. R. 158 .....	164
Slavin and Orillia, In re .....	36 U. C. R. 159..575, 576, 583, 595,	596
Smith v. Buchan.....	27 U. C. R. 106 .....	133
Smith v. Hutchison .....	2 A. R. 405 .....	686
Smith v. Lloyd .....	9 Ex. 562 .....	68, 90
Smith v. Mercer .....	L. R. 3 Ex. 51.....	133
Smith v. Provincial Insurance Co .....	18 C. P. 223 .....	448
Smith v. Scheved .....	9 Fed. Rep. 483 .....	127
Smith v. Smith .....	5 O. R. 695 .....	35
Société Générale de Paris v. Walker ....	11 App. Cas. 27.....	319
Soper v. Arnold .....	35 Ch. D. 384 .....	394
Soule v. Grand Trunk R. W. Co .....	21 C. P. 308 .....	191
Southampton's Estate, In re Lord .....	16 Ch. D. 178.....	324
Spencer v. Brockway .....	1 Hammond 259 .....	137
Spencer v. Harding .....	L. R. 5 C. P. 561.....	245
Spencer, Earl, v. Swanwell .....	3 M. & W. 162.....	142
Sprague v. Smith .....	29 Vt. 425 .....	194
Stanhope, Silkstone Collieries Co., In re.	11 Ch. D. 160 .....	60
Stapilton v. Stapilton .....	2 W. & T. S. C. 6th ed., 920 ....	70
State v. Cleaveland .....	3 R. I. 117 .....	575
State v. Ragland.....	75 N. C. 12.....	5
State of Wisconsin v. The Pelican Insur- ance Co.....	127 U. S. 265 .....	138, 140
Steam Engine Co. v. Hubbard.....	101 U. S. 188 .....	139
Steinhoff v. Kent.....	14 A. R. 16 .....	443
Stephen v. Simpson .....	12 Gr. 493; 15 Gr. 594.....	93
Stephen v. Therso Police Commissioners.	3 Ct. of Sess. Cas. 4th Ser. 545 ..	261
Stephens v. Wilkinson .....	2 B. & Ad. 320.....	229
Stevenson v. Rice .....	24 C. P. 245 .....	233
Stinson v. Pennock.....	14 Gr. 604 .....	354
Stogdon v. Lee .....	1 Q. B. 661 (1891) .....	469
Stokes v. Stickney .....	96 N. Y. 323 .....	139
Stott v. Clegg .....	13 C. B. N. S. 619 .....	304
Stoughton's Appeal .....	88 Pa. St. 198 .....	628
Stovall v. The Farmers' and Merchants' Bank of Memphis .....	8 Smed. & M. 305 .....	126

NAMES of CASES CITED.	WHERE REPORTED.	Page of Vol.
Stretton v. City of Toronto .....	13 O. R. 139 .....	291
Stubbins Ex parte .....	17 Ch. D. 58 .....	656
Sturge v. Great Western R. W. Co ....	19 Ch. D. 444 .....	70
Stylon v. Wisconsin, etc., Ins. Co .....	69 Wis. 224 .....	342
Submarine Telegraph Co., The, v. Dickson	15 C. B. N. S. 759 .....	293
Sugden v. Lord St. Leonards .....	1 P. D 154 .....	169
Sulte v. Three Rivers .....	5 (Montreal) Legal News 330 .....	575, 597
Swain v. Ayres .....	21 Q. B. D. 289 .....	4
Swinyard v. Bowes .....	5 M. & S. 62 .....	133

## T.

Tasker v. Small .....	3 My. & C. 63 .....	3, 7, 14, 17
Tate v. Williamson .....	L. R. 2 Ch. 60 .....	600
Taylor v. Caldwell .....	3 B. & S. 833 .....	221
Taylor d., Atkins v. Horde .....	2 Sm. T. C. 7th ed. pp. 662, 663 (note) .....	93
Third National Bank v. Armstrong ....	25 Minn. 530 .....	220, 224
Thompson v. Brunskill .....	7 Gr. 542 .....	394
Thompson v. Gibson .....	7 M. & W. 456 .....	194
Thompson v. Leach .....	2 Vent. 198 .....	36
Thompson v. Noble .....	11 Morrison's Mining Reports 137 .....	628
Thompson v. North Eastern R. W. Co. ....	3 L. T. N. S. 618 .....	293
Thompson v. St. Louis Ins. Co. ....	52 Mo. 469 .....	341
Thompson v. Wilkes .....	5 Gr. 594 .....	475
Thorp v. Owen .....	2 Sm. & G. 90 .....	71, 74
Thornton v. McKewan .....	1 H. & M. 525 .....	565, 569
Tidball v. James .....	29 L. J. Exch. 91 .....	106
Tinniswood v. Pattison .....	3 C. B. 243 .....	403
Todd v. Flight .....	9 C. B. N. S. 377 .....	194
Toledo R. W. Co. v. Rumbold .....	40 Ill. 143 .....	194
Tolson v. Kaye .....	3 Brod. & B. 222 .....	118
Tompkins v. Saffrey .....	2 App. Cas. 213 .....	656
Toms v. Corporation of Whitby .....	35 U. C. R. 195 .....	190
Toronto Street R. W. Co. v. Dollery et al.	12 A. R. 679 .....	292
Trainor v. Holcombe .....	7 U. C. R. 548 .....	403
Trimble v. Turner .....	13 Smed. & M. ....	348
Trotter v. Watson .....	L. R. 4 C. P. 434 .....	4, 12, 16
Truesdell v. Cook .....	18 Gr. 532 .....	537
Trust and Loan Co. v. Kirk .....	8 P. R. 203 .....	365
Trust and Loan Co. v. Lawrason .....	10 S. C. R. 679 .....	358
Tucker v. McMahon .....	11 O. R. 718 .....	168, 176
Tucker v. Wilson .....	1 P. Wms. 261 ; S. C. 5 Br. P. C. 193 .....	236
Tufts v. Mottashed .....	29 C. P. 539 .....	233
Turner v. Goldsmith .....	7 Times L. R. 233 .....	222
Turner v. Imperial Bank of Canada, In re.	9 P. R. 19 .....	121
Turner v. Stones .....	1 D. & L. 122 .....	134
Twining v. Morrice .....	2 Bro. C. C. 326 .....	25
Tylee v. Deal .....	19 Gr. 601 .....	63, 69, 74, 89, 90

## U.

Uniacke, In re .....	1 J. & L. 1 .....	38
United States of America v. McRae ....	L. R. 3 Ch. 79 .....	138

## V.

NAMES OF CASES CITED.	WHERE REPORTED.	Page of Vol.
Vanderlip v. Smith .....	32 C. P. 60 .....	292
Van Wart v. Woolley .....	3 B. & C. 439 .....	133
Voak v. N. Y. Central R. W. Co. ....	75 N. Y. 320 .....	198

## W.

Wainford v. Heyl .....	L. R. 20 Eq. 321.....	475
Wakelin v. London and South Western R. W. Co. ....	12 App. Cas. 41 .....	208
Walker v. Kelly .....	24 C. P. 174 .....	425
Wall v. Bright.....	1 J. & W. 494 .....	3, 14, 16, 22
Wanty v. Robins .....	15 O. R. 474 .....	277
Ward v. Ward .....	L. R. 6 Ch. 789 .....	71, 94
Ware v. Regent's Canal Co .....	3 DeG. & J. 212 .....	454
Waring v. Ward.....	2 Ves. 337.....	470, 474
Wasmer v. Delaware, Lackwanna and Western R. W. Co. ....	80 N. Y. 215 .....	192
Welcome v. Inhabitants of Leeds .....	51 Me. 313 .....	194
Wenlock, Baroness, v. River Dee Co....	11 App. Cas. 354 .....	460
West Nissouri v. North Dorchester ....	14 O. R. 294 .....	520
Westover v. Turner .....	26 C. P. 510 .....	408
Wheelhouse v. Darch .....	28 C. P. 269 .....	292
Whitaker, In re, Christian v. Whitaker.	34 Ch. D. 227 .....	90
White v. Barton.....	18 Beav. 192 .....	55
White v. Tomalin .....	19 O. R. 513.....	239, 241, 245
White v. Township of Gosfield .....	10 A. R. 555 .....	260
Whittemore v. Macdonell.....	6 C. P. 547 .....	146
Whyte v. Home Ins. Co. ....	14 L. J. Jur. 301 .....	448
Wickham v. Hawker.....	7 M. & W. 63 .....	412
Wiles v. Snyder .....	64 N. Y. 173 .....	139
Willcox v. Godfrey .....	26 L. J. N. S. 328.....	169
Williams v. Balfour .....	18 S. C. R. 479 .....	472
Williams v. Byrnes ....	1 Moo. P. C. N. S. 198.....	241
Williams v. Colonial Bank .....	38 Ch. D. 308, 15 App. Cas. 267..	311, 315
Williams v. Jordan .....	6 Ch. D. 517 .....	239
Williams v. Potts .....	L. R. 12 Eq. 149.....	69, 94
Williams v. Sorrell.....	4 Ves. 389 .....	324
Williams v. Williams.....	L. R. 2 Ch. 294.....	68, 69, 72, 93, 97
Willmott v. Barber .....	15 Ch. D. 96 .....	72, 109
Wilson v. Hirst .....	4 B. & Ad. 760 .....	372
Wingrove v. Wingrove.....	11 P. D. 81 .....	611
Wisconsin, State of, v. Pelican Fire Ins. Co. ....	127 U. S. 265 .....	139, 154, 158
Wolff v. Oxholm.....	6 M. & S. 92 .....	138, 141, 153, 154
Wood v. Leadbitter .....	13 M. & W. 838 .....	293
Woodgate v. Knatchbull .....	2 T. R. 154 .....	155
Wright v. Chard .....	4 Dr. 673 .....	475
Wylson v. Dunn.....	34 Ch. D. 569.....	210, 212, 216

## Y.

Yoder v. Atterburn.....	7 T. B. Mon. 478.....	127
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ERRATUM.

Page 622, last line of headlines for "ch. 40" read "ch. 41."



# ONTARIO APPEAL REPORTS.

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IN RE FLATT AND THE UNITED COUNTIES OF PRESCOTT  
AND RUSSELL.

*Municipal Corporations—By-law—Petition—Freeholder—R. S. O. (1887),  
ch. 184, sec. 9.*

By the term “freeholder” as used in R. S. O. (1887), ch. 184, sec. 9, which enables a county council to pass a by-law constituting a village corporation, upon the petition of a certain number of freeholders, is meant a person actually seised of an estate of freehold, legal or equitable; and it does not include persons in possession of land under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of STREET, J., reversed, [MACLENNAN, J. A., dissenting.]

THIS was an appeal from the judgment of STREET, J., Statement.  
dismissing a motion to quash a by-law.

The by-law in question was passed for the purpose of incorporating the village of Casselman, and was objected to on the ground that a sufficient number of freeholders had not petitioned therefor, as required by R. S. O. (1887), ch. 184, sec. 9. The total number of petitioners was 113. It was admitted that forty of these were freeholders, but it was contended that a number of others, who were treated as freeholders, were not freeholders within the meaning of the section. Several of the persons objected to were in possession of land within the limits of the proposed village under agreements in the following form :

I,	of the village of Casselman,	
	agree to purchase from John Ira Flatt and John	
Bradley, lot number	on	street in said
village, according to their survey thereof, for the sum of		
\$	which amount I agree to pay as follows :	
\$	on the	day of
\$	on the	day of
		188
		188

Statement.	\$	on the	day of	188
	\$	on the	day of	188
	\$	on the	day of	188

The amount from time to time unpaid to bear interest at per cent. per annum, payable half-yearly on the first days of and . Arrears of interest to bear same interest. I accept their title thereto. On full payment I am to receive a statutory conveyance of said lot. Until full payment I acknowledge myself tenant from year to year to said Flatt & Bradley, their heirs and assigns, of said lot at a rent equivalent to and payable at the same time as the interest herein mentioned, which, when paid, is to satisfy same. I agree that said tenancy may be terminated by said Flatt & Bradley, their heirs or assigns, immediately on any default. I charge my interest in said lands with the payment of any amount from time to time due said Flatt & Bradley, their heirs or assigns, or any firm of which they or either of them shall be a member, for any lumber, shingles or other building material that has been or may be supplied for use on said lands, together with interest at the rate aforesaid on such amounts. On any default the contract may be rescinded, and the premises re-sold, and costs of re-sale and any deficiency thereon I am to make good. Time is to be of the essence of the contract.

AS WITNESS my hand this day of 188 ,

Witness : }

The agreements were not signed by the vendors.

Some others of the persons objected to were in possession under oral agreements only.

In some instances the persons in possession had paid all the purchase money, and fulfilled all the conditions. In other instances the purchase money was still unpaid. The council, however, treated these persons as freeholders, and passed the by-law. Treating these persons as freeholders there were more than fifty freeholders in all, but even then not as many as one-half of the whole number of petitioners were freeholders.

The application to quash was made before STREET, J.,

who after expressing the opinion that a person having an equitable estate of freehold was a "freeholder" within the meaning of the section, directed the application to stand over, and evidence to be put in [as to the acts done under the agreements in question. Upon this evidence he came to the conclusion that these persons were in a position to compel specific performance by the vendors, and that they were therefore "equitable freeholders," and dismissed the motion.

The applicants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 16th and 19th of May, 1890.

*G. F. Shepley*, Q.C., and *J. Bicknell*, for the appellants. Under the section in question one-half the petitioners must be freeholders, and that is not the case here. But even if only fifty freeholders need join in the petition the present appeal must succeed as persons holding under agreements of the kind in question are not freeholders within the meaning of the section. The owners of a legal estate of freehold are intended by the term as used in the section. "Freeholder" here is equivalent to "proprietor," *i. e.*, a person having an absolute right. Where an equitable freehold is intended it has been specially mentioned. See section 73 for example. At all events these persons are not even equitable freeholders. An equitable freeholder is one who is the true and absolute owner of the land, but with the legal estate outstanding in some other person. Here there is a mere equitable right resting in contract, and this confers no status except as between the parties themselves, and is one depending upon the due fulfilment of the terms of the agreement. While this right rests in contract, the lands themselves are not in any way affected. If, for example, the purchaser dies without heirs, the lands do not escheat to the Crown, but continue to be held by the vendor: *Lewin on Trusts*, 8th ed., p. 940; *Wall v. Bright*, 1 J. & W. 494; *Tasker v. Small*, 3 My. & C. 63; *Mc-*

Argument.

*Creight v. Foster*, L. R. 5 Ch. at p. 612 ; *Trotter v. Watson*, L. R. 4 C. P. 434 ; *Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. 579, at pp. 589, 590, 591, 595 ; *Rex v. Geddington*, 2 B. & C. 129 ; *Rex v. Llantillio*, 5 B. & C. 461. Then in these agreements the persons in possession are described as "tenants," and that estops them : *Swain v. Ayres*, 21 Q. B. D. 289 ; *Re Holburne*, *Coates v. Mackillop*, 53 L. T. N. S. 212 ; *Lowther v. Heaven*, 41 Ch. D. 248.

*J. H. Ferguson*, Q.C., and *J. B. O'Brian*, for the respondents. It is quite clear that it is only necessary to have fifty freeholders, and there is that number here. The term "freeholder" is not used in a technical sense, but in the sense in which it is used in the Assessment Act, *i.e.*, as denoting persons liable to taxation. It cannot be used in its technical sense, or else persons having no interest in the locality might vote, as mortgagees, persons having titles of honour, &c. It is used in connection with the word "householder," which is not a technical term, and, indeed, is not a term having a known legal signification, but is found, and only found, in the Assessment Act. The persons petitioning must reside within a certain area. What is intended is evidently a petition by a certain number of taxpayers. But even if the word is construed strictly it would in itself include an equitable freeholder. The original distinction between "freehold" and "less than freehold" turned on quality and not quantity. A term for 1,000 years was not freehold, while one for life was. But now that distinction has been done away with and legal and equitable estates are viewed in the same way, and equitable estates are looked upon as hereditaments : *Challis's Real Property*, pp. 6, 42 ; *Finlason's History of Tenures*, p. 46 *et seq.* Formerly, in Courts of Equity, a man holding under an agreement to purchase was, as soon as title was accepted and possession taken, looked upon as the real owner : *Seton v. Slade*, 7 Ves. at p. 274 ; and now in all Courts he must be looked upon as the owner and really as a freeholder : *Chambers on Estates and Tenures*, p. 82. The agreement does not make these persons tenants ; its provisions are inconsistent with



this. A lien is given, the title is accepted, and there is a <sup>Argument.</sup> provision for re-sale. See also *State v. Ragland*, 75 N. C. 12; Washburn on Real Property, 5th ed., vol. 2, p. 167; *Gage v. Scales*, 100 Ill. 218; Kent's Commentaries, 12th ed., vol. 4, p. 24.

*Bicknell*, in reply.

October 3rd, 1890. BURTON, J. A. :—

The question in this case turns upon the meaning of the word "freeholder," as found in section 9 of the Municipal Act, which requires as a preliminary to any action of the council that it shall be preceded by a petition signed by not less than 100 resident freeholders and householders of whom not fewer than half shall be freeholders; it is not stated that at least fifty shall be freeholders, but leaves it open to question whether one-half of the petitioners actually signing shall not be freeholders, but the proper construction probably is that at least fifty of the petitioners shall be freeholders. No definition of freeholder is given in the interpretation clause, but it is contended that a number of persons who held under agreements signed by them but not by the lessor or alleged vendor are equitable freeholders.

One of these is given as a sample in the learned Judge's judgment in these words:

[The learned Judge read the agreement, and continued:]

The learned Judge thought that something more than the agreement and possession under it was necessary to entitle the person claiming under it to be treated as a freeholder, and he directed a scrutiny. No written judgment is given of his decision on the further evidence, but the evidence seems to have established these further facts:—

That in some cases the parties have made improvements, and made nearly all the payments, and are ready to pay the balance on a good title being shewn.

That one or two held under verbal agreements, but had paid in full and were entitled to their deeds.

Judgment.

BURTON,  
J.A.

That some of the agreements were signed by Flatt and Bradley the owners, although there was no express covenant or obligation on their part to convey ; that some of the agreements did not contain any attornment clause, and that in many of the cases the owners had advanced moneys for making the improvements which had to be repaid before the purchasers could call for a conveyance.

In the view I take of these persons' rights, there were not fifty freeholders upon the petition.

It is not necessary to consider whether, if the whole purchase money had been paid, and the title accepted, so that the purchaser became absolutely entitled to call for a conveyance, and nothing remained but the mere formal execution of the deed, he could be said to have an equitable estate, as distinguished from an equitable right to call for a conveyance in future when the purchase money has been paid and all conditions fulfilled. That is not the case in the present instance.

The question, therefore, would seem to resolve itself into whether a mere agreement, signed or not signed by the owner, but under which the purchaser has entered either admitting or not admitting himself to be a tenant, makes him a freeholder within the meaning of the Act of Parliament,—which is dealing with the status of the petitioner—until entitled absolutely and unconditionally to his deed.

It seems to me that the cases which have been cited as to conversion and specific performance have no bearing upon the case we are called upon to consider. Those cases are correct expositions of the law as between the parties to the contract, but cannot be extended so as to affect the interests of others. If they could, a contract for the purchase of an estate would be equivalent to a conveyance of it. There are many cases in which a person who is claiming under a contract of purchase, and who, after obtaining a conveyance, could enforce equities attaching to the property against a stranger, cannot do so before the contract is fully carried into effect by a deed.

In Elliott on Parliamentary Electors, 2nd ed., p. 60, the

cases of contracts for the sale of land are discussed, and the result is thus summed up: "The interest of a purchaser, therefore, under a contract is rather an equity or equitable right than an equitable estate; and though, for some purposes, equities or equitable rights are analogous to legal rights, they differ from the latter, in being assignable for valuable consideration and devisable, which makes them at first appear to be identical with equitable estates; whereas equities or equitable rights, if not asserted within a reasonable time, are lost. \* \* It may be also observed that if the purchaser be let into possession before completion of the contract, though this may so far vary the case that his equitable right would be preserved from being barred by lapse of time, yet it can hardly be considered to convert his right into an estate pending the contingency of the title being made good and the money being paid; for should the contract be eventually rescinded, or found to be such as the Court would not enforce, the purchaser would have to account for the rents and profits received by him, and it is inconsistent with the nature of an equitable estate, that the person entitled to it should in any event be liable to account to another for all the rents and profits which he may happen to receive."

I think the case of *Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. 579, is valuable as showing the distinction between equitable rights and equitable estates, but I refer to it particularly as a confirmation of Lord Cottenham's language in *Tasker v. Small*, 3 My. & C. 63, to which I have above referred, viz., that the rule by which a purchaser becomes in equity the owner of the property sold, "applies only as between the parties to the contract, and cannot be extended so as to affect the interests of others."

I think section 74, so far from aiding the respondents, is against them. That section is dealing with the question of qualification: this, with the status of the person entitled to petition; but even in section 74, the Legislature deem it necessary to declare that the qualification may be

Judgment.

BURTON,  
J.A.

Judgment.

BURTON,  
J.A.

of an estate either legal or equitable; whilst in section 9, when dealing with the status of petitioners, they omit the word equitable. But I do not wish it to be considered that I am deciding that a person having an equitable estate of freehold would not be a good petitioner, but simply that the persons holding under these contracts with the conditions unfulfilled, and the vendor's title in some cases still to be made out and approved of, have not an equitable estate, but a mere right in certain contingencies to compel specific performance of those contracts.

I think that the word "freeholder," as used in this section, and that is all we are called upon to decide, is a person actually seised of an estate of freehold, legal or equitable, but that the persons holding these agreements did not come within the definition.

HAGARTY, C. J. O.:—

I agree with the judgment just pronounced by my brother BURTON. I think when the Legislature used the word "freeholder," they meant a person having that status in the common acceptation of the term. We may fully agree that when a person has an equitable estate amounting to a freehold interest, we may accept it as within the statute. But I cannot agree that a contract for the acquisition of the freehold on performance of certain things by an occupant of land, whether such conditions have or have not been fulfilled, clothes him with the status and position of a freeholder, legal or equitable.

I fully concur with my learned brother MACLENNAN's citation of the view the Courts take of the position of contracting parties on the execution of the contract, and how it is to be worked out between them and all parties claiming under them. But I am unable to agree that as to the outside world—including the Legislature,—it places the vendee in the position of the holder of a freehold estate, legal or equitable.

It has been argued before now that the estate must be



considered to have actually passed. I think the true effect of the contract is fully stated and defined in the language of Lord Esher in *Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. 579, and by the same learned Judge in *Rayner v. Preston*, 18 Ch. D. 1. I need not quote from either of these cases further than my learned brother has.

Judgment.

HAGARTY,  
C.J.O.

Nothing can be clearer than the language declaring that it is only a contract for a conveyance and is not equivalent to a conveyance. As Lindley, L. J., says, 23 Q. B. D. p. 594: "They are inviting us to destroy the distinction between an agreement to convey property and a conveyance of the property."

Lord Cottenham's words are cited that the rule by which a purchaser becomes in equity the owner of the property sold applies only as between the parties to the conveyance.

I think that these cases touch the vital part of the case before us. A man may become for certain purposes, as between himself and his co-contractor, the owner of a property agreed to be conveyed to him on certain conditions, but the rule does not go further, and as regards the rest of the world he is not a freeholder, either legal or equitable.

The two cases of *Rayner v. Preston*, 18 Ch. D. 1, and *Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. 579, very fully discuss the point as to the vendor becoming a trustee for the vendee.

OSLER, J. A. :—

This is an appeal from the judgment of Mr. Justice STREET, dismissing the appellants' motion to quash a by-law of the respondents, passed on the 22nd of June, 1888, entitled, "By-law to erect the unincorporated village of Casselman and neighbourhood into an incorporated village, apart from the town of Cambridge, by the name of Casselman."

The motion was made on the 11th of December, 1888,

Judgment.

OSLER,  
J.A.

and came on to be heard on the 22nd of January, 1889, but further evidence and explanations having been called for by the learned Judge, it was not finally disposed of until the 20th of January, 1890.

The objection to the by-law is that the council had no power to pass it because the petition for incorporation was not signed by the necessary number of freeholders, &c.

The learned Judge directed a scrutiny into the qualification of those petitioners who were objected to, and appears to have held (though there is no written note of his judgment on this point) that the petition was signed by the requisite number of freeholders by including therein the names of several persons who were entitled to be regarded as equitable freeholders. He also held that the motion had been made in due time, and that there had been no laches for which the applicants were responsible.

The power of the county council to pass a by-law constituting a village corporation depends upon section 9 of the Municipal Act, which in substance enacts that upon the census returns of an unincorporated village and neighbourhood taken under the direction of the council shewing that the same contain over 750 inhabitants, &c., then on petition by not less than 100 resident freeholders and householders of the village and neighbourhood of whom not fewer than one half shall be freeholders, the council shall by by-law erect the village and neighbourhood into an incorporated village apart from the township.

A census was taken under the direction of the council, and the commissioner's return, dated 28th March, 1888, reported a total resident population of 961 "souls" residing within an area of less than 500 acres.

Subsequently, the precise date does not appear, the petition on which the county council acted in passing the by-law was presented.

It purports to be signed by 45 persons, classed therein as freeholders, and by 67 as householders, but it is contended by the respondents that of those ranked in the latter class, a large number were really equitable freeholders.

so that the actual proportion of freeholders who signed was considerably in excess of what the statute requires.

Judgment.

OSLER,  
J. A.

The appellants also contend that at least one half of the whole number of the petitioners, whether 100 or more, must be freeholders; but this, in my opinion, is not the true construction of the section, which only requires that one half of the minimum number of 100 petitioners shall possess that status.

The broad question then is, what is meant by this term? Does it embrace an equitable freeholder? The Act contains no definition of it, and so far as status is concerned, I see no reason for thinking that the freeholder mentioned in the 9th section, is different from the person assessable as such under the Assessment Act, R. S. O. (1887), ch. 193, sec. 14, or who may be qualified as such under sections 73 and 79 of the Municipal Act.

But in this section the qualification as elector or as member of the council is not the test of the freeholder's right to petition. The value of his property as rated on the assessment roll may be quite insufficient for the one purpose. All that is necessary for the other is that he should possess the status of freeholder. Similar language is used in section 13 (4) which empowers the Lieutenant-Governor upon petition of a majority of the resident freeholders and householders to annul the incorporation of the village, while inchoate, under certain circumstances; while by section 16, sub-section 1, a resolution of the township council to disincorporate a village, and by section 17, a petition to a township council to set apart an unincorporated village for local improvement purposes, are to be approved in the one case by the "electors," (as defined by 52 Vic. ch. 36, sec. 2,) and by a majority of the ratepayers, of whom one half shall be resident freeholders, in the other.

I am of opinion that the possessor of an equitable freehold is a good petitioner under the 9th section. It is true that section 74, which deals with qualifications—"the qualifications of all persons where a qualification is required

Judgment.

OSLER,  
J.A.

under this Act"—expressly declares that such qualification may consist of an estate either legal or equitable, or may be composed *partly of each*,—words which evidently point to the amount of the rated qualification—and that section 9, which relates to the status alone, says nothing of equitable interests. I think, however, it would be giving too narrow a meaning to the term to hold that it did not embrace an equitable freehold. It is extremely improbable that the legislature intended to use it in a more restricted sense in section 9 than in section 17, where, referring also to the status of the petitioner, it clearly means the assessed freeholder, the ratepayer who is assessed as such; and reading sections 73, 74, and 79 together, it is manifest that the holder of an equitable freehold was intended to be assessed under the designation of freeholder. While, therefore, section 74 does not support the respondents' contention, I do not see that it furnishes any argument founded on the maxim *Expressio unius, &c.*, conclusively opposed to it.

I refer on this point to *Regina v. Llantillio*, 5 B. & C. 461, and *Trotter v. Watson*, L. R. 4 C. P. 434.

It is admitted that the names of forty persons entitled to be classed as freeholders are attached to the petition. Of the forty-five so denominated therein, four are admittedly to be taken off. Five names of persons admittedly freeholders but not classed, or taken from the householder class, are to be added, thus making the total number of alleged freeholders, forty-six. But as of these forty-six the appellants object to six as having been wrongly classed as freeholders, there remain only forty whose status is unquestioned. These six the respondents claim as equitable freeholders, and they also claim as such seventeen other persons who have, as they contend, been improperly denominated householders.

The respondents' case will therefore be sustained if it can be shewn that ten of these persons were equitable freeholders. It is not contended that their right can be put on any higher ground, for at the time of signing the peti-



tion they had not obtained the conveyance of the legal estate in the land of which they were said to be freeholders. Of the twenty-three persons above claimed, two appear to have had at that time no title whatever. As to the other twenty-one, it is claimed that being in possession under contracts of sale, verbal or written, and in the former case under such circumstances that upon performance of the conditions of sale specific performance would be granted at the suit of the purchaser, they were equitable freeholders. By the terms of the written agreement in nine of these cases the vendors' title was accepted, and part of the purchase money had in fact in these and most other cases been paid at the time the petition was signed, but in all of them it was either not then all due, or if due, was in arrear and unpaid; so that the purchasers were not then entitled to their deeds as having fully performed the conditions of their contract. In two instances, this may, perhaps, not be quite so clear upon the evidence, but as they can make no difference in the result I do not further refer to them. In some instances it appeared that the vendors had an account against the purchaser for lumber and materials supplied for building the house on his lot, which by the terms of the agreement constituted a charge on the purchaser's interest.

What the respondents rely upon in support of their contention that these persons are seised of an equitable freehold is, of course, the rule of equity as to the contract passing the estate. They cannot rely upon their possession: for although possession is no doubt *prima facie* evidence of a seisin in fee—of a freehold—it is here explained and shewn to be referable to the terms of the agreement and to depend upon the permission of the vendors.

The question whether, under the circumstances, the purchaser acquires an equitable freehold so as to entitle him to be registered as a voter under the English Registration Acts, which require that the voter shall possess the status of a legal or equitable freeholder, is similar to the question

Judgment.

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 OSLER,  
J.A.

Judgment.

OSLER,  
J. A.

now presented for consideration, and is one upon which the text writers are not, it seems to me, entirely in accord.

In Elliott on Parliamentary Electors, 2nd ed., p. 60, the writer sums up a discussion of the subject by saying that "upon the whole there appears much reason to hold, that so long as the purchaser is liable to be barred by lapse of time, or to have in any event to account for what he receives (for rents and profits), or has not an unqualified right to require the legal estate to be conveyed to him, he has not an equitable estate, nor can with propriety be said to be seised in equity of the land contracted to be purchased." The authorities relied upon, are, I think, *Wall v. Bright*, 1 J. & W. 494 and *Tasker v. Small*, 3 My. & C. 63, from which it is deduced that "the interest of a purchaser under a contract, is rather an equity or equitable right than an equitable estate; and though for some purposes equities or equitable rights are analogous to legal rights, they differ from the latter, in being assignable for valuable consideration and devisable, which makes them at first appear to be identical with equitable estates; whereas equities or equitable rights, if not asserted within a reasonable term, are lost, \* \* in other words are virtually barred by lapse of time."

In Rogers on Elections, 14th ed., vol. 1, pp. 33-36, dealing with similar words, "persons seised at law or in equity," the writer says: "Equitable titles also arise upon contracts where one has agreed to sell and another to purchase certain premises, and the vendee gets into possession before any conveyance executed. By the rule of equity, which considers things agreed to be done as actually performed, the vendor, in such a case, becomes a trustee for the purchaser": citing Lord Eldon's language in *Seton v. Slude*, 7 Ves. at p. 274: "The estate, from the sealing of the contract, is the real property of the vendee."

Again, at p. 36: "In all these cases the question is, whether the vendee is in a position to compel a conveyance in a Court of Equity: if he is, then, by the principles of that Court, he has an equitable estate in the land. If,

therefore, he has paid the purchase money *or only a part of it*, an arrangement having been made with regard to the remainder, and has been let into possession, which, generally speaking, amounts to an acceptance of the title, little doubt can exist of his right to vote."

Judgment.

OSLER,  
J.A.

In Heywood's Digest of County Election Law, (1812) a work of some authority, (*Chorlton v. Lings*, L. R. 4 C. P. at p. 384) in ch. 4, p. 109:—"Electors must have a freehold interest:" it is said in reference to the statute which conferred the right of voting upon *cestuis que trustent* in possession: "Questions of equitable purchases frequently arise. When a person has agreed to sell and another has agreed to purchase certain premises, whether in writing or not, the vendee, being put in possession of the estate and taking the rents and profits to his own use by virtue of the agreement, and having paid the whole *or any part of the purchase money*, \* \* has an equitable freehold, and a right to vote." Chamber's Dictionary of Elections, (1837), p. 262; and Male on Elections, p. 278.

The decisions referred to by the writers are those of election committees, and are to the same effect.

In the case of *Regina v. Llantillio*, 5 B. & C. 461, the question was whether the pauper had gained a settlement under the 9 Geo. 1, ch. 7, sec. 5, which enacted that no person should be deemed to gain a settlement for or by virtue of any purchase of any estate or interest in such parish whereof the consideration for such purchase did not amount to the sum of £30 *bonâ fide* paid. Bayley, J., said: "There must be the purchase of an estate or interest, and by the latter word must be understood the purchase of some specific definite interest, and the party contracting must become the purchaser. *Regina v. Long Bennington*, 2 B. & C. 152, and *Regina v. Geddington*, 2 B. & C. 129, establish that although an equitable estate is sufficient to give a settlement, still the purchase must be completed; and that if it be not an estate, but an equitable right only, no settlement is gained. The principle deducible from those cases is, that the relation of trustee and *cestui que trust*



## Judgment.

OSLER,  
J.A.

must be created in order to give a settlement by the purchase."

*Wall v. Bright*, 1 J. & W. 494, is cited with approbation by Lord Hatherléy, in *McCreight v. Foster*, L. R. 5 Ch. 604, and by the same learned Lord and Lord O'Hagan, in the same case in the House of Lords; *sub. nom. Shaw v. Foster*, L. R. 5 H. L. 321. Sir Thomas Plumer, M.R., speaking of the relation between vendor and purchaser says: "The vendor is not a mere trustee; he is in progress towards it, and finally becomes such when the money is paid, and when he is bound to convey; in the meantime he is not bound to convey. There are many uncertain events to happen before it will be known whether he will ever have to convey, and he retains, for certain purposes, his old dominion over the estate."

This case and the two cases cited from Barnwall and Creswell's Reports were followed and approved in the case of *Trotter v. Watson*, L. R. 4 C. P. 434, a registration appeal, where the Court declined to treat a purchaser whose right rested in contract merely, the conditions of which had not been performed, as having an equitable estate for the purposes of the Act.

In the well known case of *Knox v. Gye*, L. R. 5 H. L. 656, at p. 675, Lord Westbury said that the vendor is called a trustee only by a metaphor and by an improper use of the term, and that he is such only to the extent of his obligation to perform the agreement between himself and the purchaser. "The application to a man who is improperly, and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee, holding the property exclusively for the benefit of the *cestui que trust*, well illustrates the remark made by Lord Mansfield, that nothing in law is so apt to mislead as a metaphor." And in *Rayner v. Preston*, 18 Ch. D. 1, Brett, L. J., discussing the relation between vendor and purchaser says: "It seems wrong to say that the one is a trustee for the other. The contract is one which a Court

of Equity will enforce by means of a decree for specific performance. \* \* What is the relation between them, and what is the result of the contract? Whether there shall ever be a conveyance depends on two conditions; first of all whether the title is made out, and secondly, whether the money is ready; and unless those two things coincide at the time when the contract ought to be completed then the contract never will be completed, and the property never will be conveyed. \* \* Therefore, I venture to say that I doubt whether it is a true description of the relation between the parties to say that from the time of making the contract, or at any time, one is ever trustee for the other. They are only parties to a contract of sale and purchase of which a Court of Equity will under certain circumstances, decree a specific performance." I refer also to the judgments of Cotton, and James, LJJ., in the same case, and to Hayes on Conveyancing, vol. 1, pp. 96, 99; vol. 2, note (40); *Shrapnel v. Vernon*, 2 B. C. C., 268; Washburn on Real Property, 5th ed., vol. 2, p. 181; *Cholmondely v. Clinton*, 2 J. & W. at p. 148. These authorities, in my opinion, strongly shew that the interest of the purchaser until he is entitled to call for the conveyance is properly an equity or equitable right rather than an equitable estate.

Judgment.

OSLER,  
J.A.

The case of *Shaw v. Foster*, L. R. 5 H. L. 321, already referred to, itself illustrates some of the qualifications to which the general rule is subject, and so also, in a manner specially applicable to the case before us, does *Tasker v. Small*, 3 My. & C. 63, which Lord Justice Lindley referred to in a recent case, in the following language: (*Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. at p. 595) "Lord Cottenham pointed out long ago in *Tasker v. Small*, 3 My. & C. 63, that, although, if a person agrees to buy land and the agreement is one of which a Court of Equity will decree specific performance, the purchaser becomes thereby in equity the owner in a certain sense, and acquires rights and interests which he can devise or sell, and which will pass to his heir by inheritance, still it is an entire

Judgment.

OSLER,  
J.A.

mistake to suppose that an agreement is equivalent to a conveyance. Lord Cottenham said in that very case that the rule by which a purchaser becomes in equity the owner of the property sold, 'applies only as between the parties to the contract, and cannot be extended so as to affect the rights and interests of others. If it could, a contract for the purchase of an equitable estate would be equivalent to a conveyance of it.'” If then, the vendor is trustee for the purchaser only in the qualified or metaphorical sense above described, I cannot see how the purchaser can be said to be *cestui que trust* in any other sense, or to have the status of an equitable freeholder.

I think the proper conclusion to be deduced from these authorities is that although the petitioners I have referred to were in possession, and had paid part of their purchase money (as to which see *per* Lord Cranworth, in *Rose v. Watson*, 10 H. L. C. 672); yet as they had not performed all the conditions of their contracts and were not in a position to require the conveyances to be executed to them, they were not equitable freeholders, and consequently the petition was not signed by a sufficient number of persons of the freeholder class.

I refer to the definition of an equitable estate in Smith's Real and Personal Property, p. 196 : “An equitable estate is a right in equity to take the rents and profits of lands whereof the legal estate is vested in some other person, and to compel the person thus seized of the legal estate, who is called the trustee, to execute such conveyance of the land as the person entitled to the profits, who is called the *cestui que trust*, shall direct, and to defend his title to the land.”

MACLENNAN, J. A. :—

This appeal depends on the question whether persons in possession of parcels of land under contracts for the purchase of the fee simple, but who had not obtained their conveyance, are freeholders within the meaning of section

9 of the Municipal Act, so as to be qualified to petition for the incorporation of a village. If they are, then the petition in this case was sufficiently signed, and the appeal must be dismissed, if not, it must be allowed.

Judgment.

MACLENNAN,  
J.A.

I am clearly of opinion that such persons are freeholders within the meaning of the section.

The section requires the petition to be signed by "not less than 100 resident freeholders and householders of the village and neighbourhood" which it is sought to have incorporated.

The meaning of the word may be gathered by examining other sections of the Act in which it is used, such as sections 29, 32, 69, 70, 71, 73, 74, 79, 80, 102, 308, and 310.

By section 73, the reeve and councillors of a village may qualify on either a legal or equitable freehold or leasehold; and by section 74 it is declared that the qualification of all persons where a qualification is required under the Municipal Act may be of an estate either legal or equitable, or may be composed partly of each.

Reading this section along with section 9 it follows clearly, in my opinion, that the freehold qualification of a petitioner for the incorporation of a village may be either legal or equitable.

As I understand some of my learned brothers think that the purchasers in question are not equitable freeholders, it becomes necessary to examine particularly the meaning of the word. Wharton defines a freeholder as "one who possesses a freehold estate," and so an equitable freeholder must be one whose title is merely in equity, but yet is in respect of its duration and other qualities, a freehold estate.

Then, what is a freehold estate? In England the word freehold is used to distinguish the tenure of land; things real being either of freehold or copyhold tenure: Smith's Real and Personal Property, 6th ed., sec. 286. In England freehold land is held in various ways, but in this country all lands are held in free and common socage: 31 Geo. III., ch. 31, sec. 43.



Judgment

MACLENNAN,  
J.A.

The definition of a freehold estate given in Smith's Real and Personal Property, 6th ed., sec. 360, citing Co. Litt. 43 (b), and Burton, sec. 723, is this: "An estate or interest of freehold duration is an estate or interest in lands or tenements, which may endure forever, or is limited to endure for a life or lives, or for some uncertain period that may last for the life of the grantee or some other person at least, without being confined to a given number of years. An interest confined by a given number of years, however many they may be, (as 10,000 years) is an interest less than a freehold, a term for years, a chattel interest, a chattel real." He then goes on to observe that "the ownership of which lands and tenements are susceptible, whether it be merely legal, merely equitable, or both legal and equitable, is as unlimited in duration as the lands themselves." Then, following Cruise and Blackstone, he divides estates of freehold into freeholds of inheritance, and freeholds not of inheritance, the former being fees simple and limited fees, and the latter estates for life. This is followed by a chapter on what he calls estates or interests less than freehold, such as estates for years, estates at will, &c.

To the same effect is Williams on Real Property, 16th ed., p. 26. "A tenant, either for his own life, or the life of another, hath an estate of freehold, and he that hath a less estate cannot have a freehold."

"The owner of an estate tail is also called a tenant in tail, for he is as much a holder as a tenant for life. But an estate tail is a larger estate than an estate for life, as it may endure so long as the first owner of the estate has any issue of the kind mentioned in the gift. It is consequently an estate of freehold:" p. 54. "An estate in fee simple is, of course, an estate of freehold, being a larger estate than either an estate for life or in tail:" p. 79.

It is apparent from these citations that freeholder means a person who has an estate or interest in land, which is not merely an interest in the possession, a mere chattel interest, but an interest in the ownership, limited to endure for his own life or the life of another, at least.

The next question is, whether the persons referred to are equitable freeholders. That they have an equitable interest in their lands is indisputable; and the only question is, whether that interest is a freehold interest. I humbly think it is too clear for argument that it is. The interest which every one of those men purchased was the fee simple, and we have seen that a fee simple is the largest freehold interest recognized by the law.

Judgment.  
MACLENNAN,  
J.A.

But it is contended that a person who has a mere contract is not the owner of the land even in equity, but that it requires something more to make him so; I am unable to agree to that contention.

Nothing is better established than the doctrine of equity that a contract of sale and purchase makes the purchaser the owner of the land from the moment the contract is made. It is only necessary to cite *Shaw v. Foster*, L. R. 5 H. L. 321, in support of this proposition. At p. 333, Lord Chelmsford states the law as follows: "According to the well known rule in Equity, when the contract for sale was signed by the parties, Sir William Forbes became a trustee of the estate for Pooley, and Pooley a trustee of the purchase money for Sir William Foster; and it was competent to Pooley to assign the benefit of his contract, or to charge his equitable interest in the property in favour of another person, and upon notice given to Sir William Foster of such assignment or charge, he would have been bound to protect and give effect to it."

And at p. 338, to the like effect is Lord Cairns: "Under these circumstances I apprehend there cannot be the slightest doubt of the relation subsisting in the eye of a Court of Equity between the vendor and the purchaser. The vendor was a trustee of the property for the purchaser; the purchaser was the real beneficial owner in the eye of a Court of Equity of the property, subject only to this observation, that the vendor, whom I have called the trustee, was not a mere dormant trustee, he was a trustee having a personal and substantial interest in the property, a right to protect that interest, and an active right to assert that



Judgment. interest if any thing should be done in derogation of it.  
MACLENNAN, The relation therefore of trustee and *cestui que trust* sub-  
J.A. sisted, but subsisted subject to the paramount right of the  
vendor and trustee to protect his own interest as vendor  
of the property."

And at p. 349, Lord O'Hagan says: "By the contract of sale the vendor in the view of a Court of Equity disposes of his right over the estate, and on the execution of the contract he becomes constructively a trustee for the vendee, who is thereupon on the other side bound by a trust for the payment of the purchase money." And at p. 356, Lord Hatherley states it to be an elementary proposition that the moment a contract for sale and purchase is entered into, and the relation of vendor and vendee is constituted, the vendor becomes a constructive trustee for the vendee.

The case of *Wall v. Bright*, 1 J. & W. 494, before Sir Thomas Plumer, was pressed upon our attention as shewing that the vendor was not a trustee for the purchaser but merely "in progress towards it"; but the meaning of that is explained in *Shaw v. Foster*, L. R. 5 H. L. 321, by Lord Hatherley, at p. 356. It is also pointed out by the late Master of the Rolls, Sir George Jessel, in *Lysaght v. Edwards*, 2 Ch. D., at p. 509, that it means "to be in progress towards being a mere trustee"; and at p. 510, after citing and quoting from *Shaw v. Foster*, L. R. 5 H. L. 321, and also quoting the language of Lord Justice Turner in *Hadley v. London Bank of Scotland*, 3 D. J. & S. 63, 70, and of Lord Westbury in *Rose v. Watson*, 10 H. L. C. 678, he says it must be considered to be established that the vendor is a constructive trustee for the purchaser of the estate from the moment the contract is entered into.

To all this is to be added the authority of Lord Eldon, as stated in *Seton v. Slade*, 7 Ves. at p. 274, as follows: "The effect of a contract for purchase is very different at law and in equity. At law, the estate remains the estate of the vendor, and the money that of the vendee. It is not so here. The estate from the sealing of the contract

is the real property of the vendee. It descends to his heirs. It is devisable by his will; and the question, whose it is, is not to be discussed merely between the vendor and the vendee; but may be to be discussed between the representatives of the vendee." Judgment.  
MACLENNAN,  
J. A.

Mr. Bicknell, who made a very ingenious and able argument, relied very much on the case of the *Commissioners of Inland Revenue v. Angus*, 23 Q. B. D. 579; but that case does not, in my judgment, at all qualify the doctrine that by the contract itself the purchaser of land becomes the equitable owner. The question there turned on the construction and meaning of a statute which said that the term "conveyance on sale," included "every instrument whereby any property upon the sale thereof is legally or equitably transferred to or vested in the purchaser," and it was held that the statute meant the formal conveyance as distinguished from the contract of sale.

At p. 588, Lord Halsbury, L. C., says: "In order that section 70 may apply, the property must be actually transferred by the instrument itself, not merely by virtue of an equitable doctrine." Lord Esher, at p. 591, says: "However clear it may be that an instrument is an agreement of which a Court of Equity would instantly decree specific performance, if it were not performed by the vendor, such an instrument is not a *conveyance on sale* within the meaning of the Act, but is only an *agreement*;" and at p. 594, Lindley, L. J., says: "They are inviting us to destroy the distinction between an *agreement to convey* property, and a *conveyance* of the property. The question is, whether this instrument is a *conveyance* or a contract to convey;" and further on he says the distinction between *agreements* and *conveyances* is recognized by the Act itself.

It was also contended, though I thought not with much confidence, that there was not a sufficient number of purchasers to make up the number of fifty freeholders required by the statute, even if we held them to be such.

I have examined the evidence with great care, and I find there is a sufficient number of purchasers to bring it

Judgment. over fifty. It appears that the investigation was stopped  
before the learned Judge, as it was admitted by the appel-  
MACLENNAN, J.A. lants that if purchasers without conveyances were free-  
holders, the number was sufficient.

With regard to the contract set out in the judgment, I think the attornment clause contained in it makes no difference. That provision was evidently inserted as a mere security for the vendors. It is an entire agreement, and its substance is a contract of sale.

If it is conceded, as it must be, that the contractee is in possession under the instrument all difficulty disappears, for he is then manifestly a purchaser in possession.

*Appeal allowed with costs,*  
MACLENNAN, J. A., *dissenting.*

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## WRIGHT V. BELL.

*Will—Construction—Per stirpes or per capita—Trusts—Infant trustee—Disclaimer—Statute of Limitations.*

A testator, who died in 1840, by his will made in that year devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and live with his widow, and then directed that "when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of my said sons and daughters who may have departed this life previous thereto" :—

*Held*, reversing the judgment of FERGUSON, J., that the division must be *per stirpes* and not *per capita*.

One of the executors and trustees, a son of the testator, was fifteen years of age at the time of the testator's death. He did not, upon coming of age, apply for probate of the will, though when probate was granted to the other executors leave was reserved to him to so apply, nor did he act in the execution of the trusts. He did not, however, in any way disclaim, and he knew of the will. In 1861, with the knowledge and consent of the acting trustee, he went into possession of certain lands that had belonged to the testator at the time of his death, believing, as he said, that the lands had been devised to him, and he remained in possession thereof for more than twenty years until the period of conversion and distribution:

*Held*, [BURTON, J.A., dissenting] affirming the judgment of FERGUSON, J., that he was in law necessarily affected with notice of the provisions of the will and of the express trust thereby created, and that he must be held to have entered as trustee and not tortiously, and could not invoke the Statute of Limitations.

THIS was an appeal from the judgment of FERGUSON, J. Statement.

The action was brought for the construction of the will of the late Thomas Bell, and for the administration of his estate.

Thomas Bell died in 1840, having first made and published the will in question, the material clauses of which were as follows :

"Secondly, I devise, give and bequeath all property that I may die possessed of or entitled to, unto my trustees and executors hereinafter named, in trust for the purposes following, that is to say : In trust to raise thereout either by the sale thereof, or of any part thereof, or by leasing the same or any part thereof, as large a sum of money as they can possibly raise for the support of my beloved wife



**Statement.**

Mary Bell, and my unmarried daughters, Deborah, Susanah and Euphemia, so long as they shall remain unmarried respectively, and live with my beloved wife in such home as may be provided for them by my said executors and trustees. And I hereby direct that such sum as my said executors and trustees are able to raise shall be paid to my beloved wife by quarterly payments, in order that she may expend the same in the support of my daughters and herself. And I further direct, and my will is that my trustees and executors hereinafter named shall not make any disposition or sale of any of my property without the consent of my said beloved wife being first had and obtained in the usual manner. In the event of any disagreement taking place in my family as to the disposition of any of my property, or otherwise, I desire that such difference or disagreement shall be settled by the direction and in such manner as the majority of my living sons and sons-in-law shall direct and point out. And I do hereby require all my children concerned to obey such direction, or else forfeit their share or participation in my property, so long as they or any one of them shall decline to do so, but no longer. When my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors hereinafter named, to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of those of my sons and daughters who may have departed this life previous thereto. But if my said family should consider it more to their advantage to keep the yearly income and divide it among them in the same manner, they are directed to do so.

“I hereby nominate, constitute and appoint my beloved sons Thomas Bell, the younger, John Bell, and James Joseph Bell, and Robert Bell Miller my executors and trustees of this my last will and testament; and I also appoint my beloved wife to be executrix of this my said last will

if she at any time shall think proper to act, but not otherwise. Statement.  
Hereby revoking all other wills by me heretofore made."

The wife of the testator and the three unmarried daughters mentioned in the will survived him. The widow died shortly after the testator. Deborah never married, and died in February, 1887. There were living at that time several children, and a large number of grandchildren, of the testator.

James Joseph Bell, one of the sons of the testator, and one of the executors and trustees named in the will, was fifteen years of age at the time of his father's death. The will was proved by Thomas Bell and John Bell, leave being reserved to Robert Bell Miller, James Joseph Bell, and the widow, to thereafter apply for probate if so advised. No application for probate was made by them. James Joseph Bell took no part in the management of the estate, or in the execution of the trusts of the will, but he never in any way disclaimed. In 1861, he, with the consent of his brother John Bell, who was the acting trustee, entered into possession of a farm that had belonged to the testator at the time of his death, and remained continuously in possession from that time, and in this action claimed title thereto by possession. The facts as to this claim are set out in the judgments.

The evidence in the action was taken at Sandwich on the 26th of October, 1888, and the argument took place at Toronto on the 25th, 26th, 28th, and 29th days of October, 1889. Judgment was delivered on the 21st of January, 1890, declaring that the defendant James Joseph Bell had not obtained title by possession; and that the property should be divided among the children and grand-children *per capita*, and not *per stirpes*, and the necessary accounts and inquiries were directed.

The defendant James Joseph Bell appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 28th and 29th of May, 1890.



Judgment. *McCarthy, Q. C., and H. S. Osler, for the appellant.*  
HAGARTY, *S. H. Blake, Q. C., J. K. Kerr, Q. C., W. N. Miller, Q. C.,*  
C.J.O. *J. Reeve, Q. C., Hoyles, Q. C., H. T. Beck, and A. H. F.*  
*Lefroy, for the several respondents.*

October 3rd, 1890. HAGARTY, C. J. O. :—

[The learned Chief Justice read the will, and continued :]

The testator left three sons, Thomas Bell, junior, John Bell, and James J. Bell, the chief defendant.

I take from the learned Judge's statement :—

“At the time of the execution of the will and the death of the testator, the defendant James Joseph Bell was an infant under twenty-one, and, as is said, about fifteen years of age. He was, nevertheless, appointed executor and trustee by the testator. He did not at any time prove the will, nor did he ever, up to this action, disclaim the trust. Only two of the executors named proved the will; these were Thomas Bell the younger, and John Bell, sons of the testator. Probate was granted to these two, and the rights of the other three to obtain probate were reserved by the Surrogate.”

Thomas Bell was the eldest son and heir.

James J. Bell (hereafter called the defendant) in his evidence states that in 1861, he entered upon these lands and has ever since retained possession. He would then be about thirty-six years of age.

He swore that his father had told him that he intended to leave him that Western District property; that he understood his father had left it to him, and that his brother John had told him to the same effect.

The land had been sold for taxes and a deed given to the purchaser about the time of the defendant's taking possession; and in 1864, John Bell bought it back and received a deed to himself as “trustee for the estate of Thomas Bell, the elder.”

There is a good deal of uncertain statement as to this taking of possession.

The death of Mr. John Bell, the lawyer, in 1875, necessarily has deprived us of much valuable evidence, which in all probability would have left the actual facts clear and plain.

Judgment.

HAGARTY,  
C.J.O.

He was at the place in question in 1861.

From the defendant's evidence, I give his account of how he entered :

"Q. Then in 1861, John put you into possession of these Mersea lands. I think it was in 1861 you said? A. Yes, it was 1861.

Q. You said John put you into possession of these Mersea lands? A. Yes.

Q. Lots three and four? A. He didn't put me into possession, I took possession.

Q. Your evidence was that he put you into possession; I was reading from your former evidence; your brother represented that your father had left it to you by his will? A. Yes.

Q. That was lots three and four? A. The west half of lot three and lot four.

Q. The east half of lot three is between lots four and three? A. Yes.

Q. And divides the two? A. Yes.

Q. Your brother represented to you? A. That my father had willed me the place.

Q. Before that, how had the place been worked? A. Well, I knew nothing about it before, how it had been managed, I did not know anything about it whatever, and after I knew that there was land up in the Western District owned by my father.

Q. In Mersea township? A. Yes—well I didn't know the township exactly.

Q. But you knew the land was owned by your father? A. Yes.

Q. And your brother came along and put you into possession? A. I didn't take possession from my brother, I took it myself; my brother told me that my father had willed the land to me.

Judgment.

HAGARTY,  
C.J.O.

Q. You went on, at all events, believing you took it under your father's will? A. Yes.

Q. You knew that your father owned land up in the Western District? A. Yes.

Q. And when you went on, then you believed you were taking them pursuant to your father's will, representing your father? A. Yes, as my own.

Q. But coming from your father? A. Yes.

Q. And when you went on these lots three and four, you went on believing you were going in under your father? A. Yes.

Q. As devisee under your father's will? A. Yes.

Q. And taking through your father? A. Yes.

Q. And that was how you came to go on? A. That was how I came to go on."

He also states that John Bell told him it was left to him by the father, and that he should take possession.

Again :

Q. And when John Bell came up he put you quietly in, is not that so? A. No, I took possession without his coming up.

Q. He didn't come up? A. He didn't come up then.

Q. He sent you up? A. Yes; well he didn't send me up, I came up.

Q. And he sent you up, that was it? A. No, it is not; he told me to come up, and he would come up shortly, but he didn't come up.

Q. To come up and do what? A. And take possession of my property, the west half of lot number three and lot number four.

Q. You believing that you were to come up as the owner under your father's will? A. Yes.

Q. And representing your father in the ownership of the land? A. No, I represented myself.

Q. Through your father? A. Yes, and being willed me by my father."

The defendant had many disputes with parties trespassing on the land. Two or three years before he took

possession John Bell had instituted proceedings against one Munger, as is said in the learned Judge's statement, in the name of himself and the defendant as trustees of their father's will, and had got possession of the land.

The defendant says he heard of the proceedings a year or two after he was in possession, and that they were in the interest of his father's estate, but he denied any knowledge of his name being used.

About 1873, the defendant was selling some timber to one Conover, and he was served with a notice by Mr. R. B. Miller, who, as he afterwards understood, was one of the trustees in the will. It is hard to understand this notice as it is addressed to John Bell and the defendant and Conover.

He says he was sent up by Mr. John Bell.

The defendant says that after this notice was served, John Bell came up and arranged the matter, Conover paying him for the timber. Witness saw them together. On this point he says :

“Q. John Bell was the acting executor of the estate ? A. Yes, he was acting, but he was not acting on the part of the land that I owned.

Q. He was the acting executor of the estate ? A. Yes, from the time of my father's death up to his death.

Q. And he was dealing with Conover in that capacity ? A. I dealt with Conover.

Q. John Bell was dealing with Conover in that capacity ? A. Yes, he was dealing with him at the time he came up.

Q. You know that ? A. Yes.

Q. He made that demand in that capacity, and got that money in that capacity ? A. Yes.

Q. Then things went on quietly ? A. Yes.”

Not long after he took possession, one of the Mungers brought ejectment against him, and he sent the writ to John Bell, who defended, and Munger failed to prove title, as the defendant says. The defendant says it was defended in his name.

Judgment.

HAGARTY,  
C.J.O.



Judgment.

HAGARTY,  
C.J.O.

I do not see how the learned trial Judge could have come to any other conclusion as the result of the evidence than where he says of the defendant: "He says he took possession as devisee under the will, and that he thought the lands had been devised to him."

When the defendant asserts, as he does several times, that "he took possession himself," and not that his brother put him into possession, he can only mean, as I understand, that he entered, considering they were his by devise.

It appears that the testator had himself occupied this property and made a clearance, for some years before he removed to Toronto, and this defendant, as a boy, had heard him say that he would leave it to him.

In the twenty-one years that elapsed between his father's death in 1840, and his entry in 1861, it may be gathered from the evidence that Mr. John Bell, the acting executor, managed the property, so far as it was managed at all. For instance, we see what he did in the action against Munger, which is shewn to have been brought by him in his own name, and that of James J. Bell, the defendant, "as surviving devisees in trust of the estate of Thomas Bell deceased," the other trustee Thomas Bell having died shortly before.

The defendant denies knowledge of this use of his name; I only refer to it as shewing John Bell's own understanding of the legal position of the parties and as explanatory of many of his acts.

The defendant having been an unsuccessful man in life for many years, goes up to this Mersea property, which he knew had belonged to his father, and as he thought had been devised to him.

He could possibly have no claim to the land except under the owner's will which he knew existed.

He was not the eldest son, and as the law then was, he could claim nothing except under a devise.

I think it clear that he entered with the full assent and privity of John Bell, who built and paid for the brick house that is spoken of.

Judgment.

HAGARTY,  
C.J.O.

Under the trusts of the will, his entry could not be tortious, and until the arrival of the period of conversion and distribution, no one could disturb his position.

His co-trustee could not except on proof of an actual ouster.

It may be fully conceded that the performance of the trusts or the acceptance of the position of trustee, could not be forced upon him, and that his acceptance must be shewn by evidence.

He was only fifteen years old when the testator died.

After the death and after his arrival at full age, he enters on the land fully aware that there is a will and believing himself devisee thereunder; and he admits that his entry was because he thought he was devisee thereunder.

He was devisee thereunder in fact. But on the happening of an event, which might occur at any moment, he, with his co-trustee, would have to convert the property into money, and the proceeds would have to be divided between himself and other branches of the family.

It is not easy, as I think, to put him in any other position than as entering under a will giving him a direct interest in the land and its proceeds when sold.

In law, I consider him necessarily affected with notice of the provisions of the will and the express trusts thereby created as regards this land.

The event in the will when the trusts for sale and distribution were to be executed, did not happen till twenty-two years after the defendant so entered into possession.

I do not see how he can be permitted to set up the Statute of Limitations and to make the land his own.

Until the event happened, it was the trustees' duty to apply the rents and profits (if any) of the estate to raising a fund for the support of the widow and unmarried daughters.

All the acts of the late Mr. John Bell—even if they affect the due performance of the trusts—are referable to a desire to assist his brother, the defendant, and his family,



Judgment. by providing a home for them in their narrowed circumstances.  
HAGARTY,  
C.J.O.

To my mind, his acts in no way point to either an abandonment of his own duty as a trustee towards this land, or in aid of any design of the defendant to become the exclusive owner thereof.

For myself, I must say that the strong impression left on my mind by the evidence is that the defendant was fully aware of the limited nature of his interest in the land.

Be that as it may, it seems hardly disputed that one who has notice of an instrument affecting his title, has notice of its contents, *a fortiori*, we may say, when he acts under it in claiming title: Sugden on Vendors, p. 775, (14th ed.)

I presume the right conclusion is, that if an estate or interest be given by deed or will, it will vest until disclaimer or refusal by the donee.

The law is fully discussed in *Siggers v. Evans*, 5 E. & B. 367, and so even in the cases of what are called onerous trusts.

I quote from the findings of the trial Judge :

"I am willing to say that I have experienced difficulty in the matter, but the conclusion at which I have arrived is, that the proper finding will be that the entry upon the land by James Joseph Bell at the time he took possession, in April, 1861, was an entry by him as trustee under the will, concurred in and very probably first suggested by his brother, John Bell, the main object being the protection of the lands from spoliation by strangers. Another object may well have been to provide a home for the time being for James Joseph Bell and his family. And I am of the opinion that this taking of possession by him, if there was nothing more, operated as an acceptance of the trusts expressed in the will, it being borne in mind that there had been nothing in the nature of a disclaimer by him, and I cannot believe or find as a fact that he was ignorant of the contents of the will. Besides he was doing an important

act in respect of these lands—namely, taking possession, or being put in possession of them. Confessedly he knew of the will, for he says he went in as devisee under it. The will was then and had long before been registered in the county registry office in the ordinary way, and I do not see why knowledge of the contents of the will should not, as a matter of the law, be imputed to him.”

Judgment.

HAGARTY,  
C.J.O.

I agree with this view of the evidence.

Many cases have been cited to us, and many have been examined. *Paine v. Jones*, L. R. 18 Eq. 320, illustrates a very clear distinction. There a devisee who had entered into possession of some land of the testator which did not pass under the will, was allowed to acquire a title under the statute, and the case is distinguished from that of *Board v. Board*. L. R. 9 Q. B. 48.

The distinction here seems very plain; all the defendant's title being derived from the will.

We may refer also to *Smith v. Smith*, 5 O. R. at p. 695, *per* Boyd, C.

I am further of opinion that the property has to be distributed *per stirpes* and not *per capita*.

I cannot conceive it possible that a testator equally dividing his property in the happening of a named event between his (say) four children, could contemplate or mean that if one should die, leaving (say) twelve children, the property should then be equally divided between fifteen persons, instead of four. He might, of course, use language causing such a result; but if so, it should be plain beyond doubt. I do not think we are driven to construe the language actually used as necessarily causing such a distribution. My learned brothers have discussed this point more fully.

BURTON, J. A. :—

Two questions arise in this administration suit. One as to the construction of the will of the testator, Thomas Bell, the other as to the running of the Statute of Limitations

Judgment. in favour of the defendant, James J. Bell, in respect of  
BURTON, certain lands in Mersea, and I propose to deal with them  
J.A. in the order in which they were dealt with by the learned Judge below.

Mr. Osler contended, and I have no doubt rightly contended, that in voluntary or express trusts no title vests in the proposed trustee by whatever instrument it is attempted to be transferred, unless he expressly or by implication accepts the office or in some way assumes its duties and liabilities, even though he agrees beforehand to accept it: *Armstrong v. Morrill*, 14 Wall. at p. 138. There is a mere presumption that he accepts.

It has been urged that the estate vested in James J. Bell until disclaimer; but this is not so, and a very little reflection would shew that it could not be so, as an estate once vested could not be divested by a mere disclaimer.

In a very early case, *Thompson v. Leach*, 2 Vent. 198, it was held that an estate did not pass until acceptance, Ventris, J. alone dissenting. It was there held that a man cannot have an estate put into him in spite of his teeth, and this view was fully upheld by the full Court of King's Bench in 1819, Abbott, C. J., remarking that the law certainly is not so absurd as to force a man to take an estate against his will. *Primâ facie*, he says, every estate, whether given by will or otherwise, is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly by some mode or other allow him to renounce or refuse the gift.

Bayley, J., is equally emphatic. He says there are many instances, as was the case in the present devise, in which a devise to a party might subject him to great inconvenience; as, for instance, a devise of an estate clothed with trusts, and as in such a case a party cannot be forced to be a trustee it would be absurd that the estate should be in him and remain with him until he is placed by some

one in a position to disclaim in a Court of Justice. Speaking there of the mode of disclaimer, which it was contended must be by matter of record, and he subsequently adds : I consider the devise to be nothing more than an offer which the devisee may accept or refuse, and if he refuses he is in the same position as if the offer had never been made.

Holroyd, J., used similar language : "A devise being *primâ facie* for the devisee's benefit he is supposed to assent to it until he does some act to show his dissent. When that is proved it shews that he never did assent to the devise, and consequently that the estate never was in him."

Best, J., adds. "It seems to be contrary to common sense to say that an estate should vest in a man not assenting to it. There must be the assent of the party before any interest in the property can pass to him."

Mr. Preston, in the 7th ed. of Sheppard's Touchstone, uses this language : "The law presumes that every grant, &c., is for the benefit of the grantee, and therefore *until the contrary is shewn*, supposes an agreement to the grant. From the moment there is evidence of disagreement then in construction of law the grant is void *ab initio* as if no grant had been made, and in intendment of law the freehold never passed from the grantor."

Parke, B., in 1847, in *Doe d. Chidgey v. Harris*, 16 M. & W. 524, after holding that there was no sufficient evidence of assent by the devisee, the expressions being so ambiguous that they ought not to have been left to the jury as evidence importing his assent, held that his disclaimer had the effect of avoiding the estate, and the consequence would be to avoid the will as to him *ab initio*, and to vest the estate in the heir-at-law.

Here the estate given to Bell was burdened with a trust, and it was no benefit to him to accept the estate, but the reverse ; very little evidence was required to show his dissent, and it is clear at the present day that a parol disclaimer or dissent is all that is necessary. This evidence is furnished in very distinct terms by the plaintiff himself, who

Judgment.

BURTON,  
J.A.



Judgment.  
BURTON,  
J.A.

tells us, that after Bell discovered that he was named as a trustee, "he gave him, the plaintiff, to understand he would claim it by right of possession; and he, the plaintiff, told him that he could not do so, that as long as Deborah lived he was merely a tenant at will, and was living there on sufferance."

In the case above referred to, *Doe d. Chidgey v. Harris*, 16 M. & W. 524, the evidence of assent was that during the reading of the will, the party named as trustee was present, and said "I ought to have had £5 for being trust;" and upon this the jury found that he had assented; but the Court held the expression so ambiguous that the question ought not to have been left to the jury, and set aside the verdict.

Whether the entry by Bell unexplained, would have furnished any evidence of assent, it is not necessary to enquire; but when we find that he entered under the erroneous supposition that the land had been devised to him beneficially it is clear that there was nothing from which a jury or other tribunal dealing with it, could properly infer assent.

The doctrine that a person having notice of an instrument is presumed to have notice of its contents, has no application to a case of this nature—neither have the Registry Acts; constructive notice is not sufficient to impose upon any one the duties and responsibilities of a trustee.

I do not think that any of the cases cited militate against the position that there must be either acceptance of the trust or some act after notice of the appointment referable to it.

The case of *In re Uniacke*, 1 J. & L. 1, is authority only for this, that the Court will not *upon petition*, appoint a new trustee in place of one who with knowledge of his appointment for many years has done nothing; the *presumption* in the absence of evidence of refusal being that he had accepted.

The case of *In re Anne Needham*, in the same volume,



at p. 34, was also a case of summary application for the appointment of new trustees, and all parties assenting to the application, the appointment was made; but the Lord Chancellor intimated that, as thirty-four years had elapsed without any disclaimer, the trustee who had abstained from acting should assign the term of years which was one of the subjects of the trust. It would, I think, have been more in accordance with principle to have directed him to file a disclaimer.

So far, therefore, I fully concur in Mr. Osler's argument, and I think there can be little room for difference of opinion, that a man cannot be made a trustee unless he elects to accept either by express declaration or something equivalent to it, or by proceeding to act in the execution of the duties of the trust. This may, I think, be treated as an aphorism; I might almost say as an axiom.

But it is said that James J. Bell entered under the will and that he cannot be heard to dispute the title of others claiming under the same will.

*Board v. Board*, L. R. 9 Q. B. 48, is authority, if any authority be wanted for so plain a proposition, that a person coming in and taking a benefit under a will can not be heard to allege that the testator had no title, or that he had any greater title than that given to him by the will, or that he is in a position adverse to those who take under the same will.

But it is, I think, a mistake to say that James J. Bell entered under the will, or obtained possession by representing that he was entitled under the will. He entered believing that his father always intended that he should have the property, and under an erroneous supposition that it had been devised to him; but he did not obtain possession by means of the will; on the contrary his possession was from the first moment adverse to those claiming under the will. Had he actually obtained possession under the will, but in ignorance of the fact that he was a trustee under it, a question of some difficulty might have arisen in reconciling the two propositions to which I have referred.

Judgment.

BURTON,  
J.A.

Judgment.

BURTON,  
J.A.

It might be a very difficult question and dicta of very eminent judges are not wanting which, if treated literally, would seem to go the full length of holding that if persons fully believed that they themselves were personally entitled to the property and that they were not trustees of it for anyone, it would nevertheless have been certain that they would have been trustees for the *cestuis que trustent*.

That expression of opinion was not necessary to the decision of the case in which it was given,—and in the case in which the remarks were made the parties in possession had entered as trustees with the knowledge that they filled that character although they were mistaken as to the parties who were interested as *cestuis que trustent*,—and I think no decision to that effect can be found. The rule appears to me to be more correctly stated in *Attorney-General v. Munro*, 2 DeG. & S. 122, where it is laid down that where a person *knowingly and expressly* acquires the possession of property as a trustee merely, or being in possession makes himself by contract *expressly* and without qualification a trustee of it, he cannot be allowed effectually to assert against the trust—at least as a defendant in a suit seeking the performance of the trust—any title (paramount and adverse to the trust) which he may himself have.

If the conclusion arrived at by the learned Judge, which was a conclusion of law and not of fact, that the taking possession by the defendant in April, 1861, was an entry by him as trustee under the will, and operated as an acceptance by him of the trusts expressed in the will, be the correct one, it follows as a necessary consequence that the statute could have no application.

But assuming the facts most strongly against the defendant, that he had knowledge of the existence of a will at the time he entered upon the land, and that he believed that the land had been devised to him by it, they fall far short in my opinion of what is required to show an acceptance by him of the trusts or to constitute him a trustee.

The learned Judge has not found, and my conclusion

Judgment

BURTON,  
J.A.

upon the evidence is, that he could not properly have found, as a fact that the defendant when he entered, had any notice that he had been appointed or named as a trustee; nor indeed until about 1876, after his brother John's death; all that the learned Judge professes is "his inability to find as a fact that he was ignorant of the contents of the will;" but it was necessary before this defendant could be made a trustee, for him to find affirmatively that he had actual notice that he had been so appointed, and with that knowledge had entered into possession. I think the evidence is overwhelming to show that he had no such knowledge until the time I speak of, and it is almost impossible to conceive that any sane man would have devoted the best portion not only of his own life time, but that of his wife and children, to the improvement of a property which he did not believe to be his own.

I do not for a moment contest the proposition that if the defendant had entered with actual notice that he was named as trustee in the will his possession would have been on behalf of the *cestuis que trustent*, and the legal estate would have been in him and his co-trustee and no one could have maintained ejectment against him, and the case referred to by the learned Judge of *Lister v. Pickford*, 34 Beav. 576, would apply. There there was no question of the trustees having accepted the trust, and in such a case their possession was attributable to their real title and not to any other. But that is precisely the distinction between such a case and the present, where it is sworn to and not disproved that at the time of entry the defendant had not accepted the trust and had no notice of it, and might have been ejected by John Bell who had the legal estate.

If an entry in ignorance of the fact that he was named as a trustee in the will converts him into a trustee it follows that the proposition with which I commenced this judgment, and which I assumed to be well established and undisputed "that a man cannot be made a trustee against his will," is erroneous.

In order to present the question in its simplest form let

Judgment.  
BURTON,  
J.A.

us assume that the defendant had been named as trustee, but took no beneficial interest of any kind under the will, but thought the land had been devised to him for his own use, and under that belief, but without the aid of the will took possession, would he not be entitled to treat himself as being in adverse possession just as in *Paine v. Jones*, L.R. 18 Eq. 320? Or if in point of fact he had taken no interest under the will, but had entered upon the land under the impression that it was devised to him when in truth it was devised to A. B., could it be urged with any show of plausibility that he was estopped from disputing A. B.'s title, or from showing that the will was invalid?

In the case of *Paine v. Jones*, L.R. 18 Eq. 320, the widow of the testator, who was one of the trustees named in the will, and had entered under the impression that the land which her husband had acquired after the making of the will, passed to her under it, was, notwithstanding, held entitled to treat herself as being in adverse possession, not only as against the heir-at-law, but against every one else, although she actually entered under the will. It was also held notwithstanding her answer in another suit acknowledged that she had entered into possession under the will, believing the land in question had passed by it, that she could not be bound by an admission made when she was ignorant of her rights; and that it made no difference that she had actually entered claiming to do so under the will.

As pointed out in that case, *Board v. Board*, L. R. 9 Q. B. 48, and the other cases referred to in the judgment, proceed on the principle that if parties have no other title than the will they are estopped from denying the title of persons under the same will.

In that case as in this the person who had gone into and was still asserting possession had no title whatever under the will, although in each case they supposed they had, and therefore the Statute of Limitations ran in their favour.

Some expressions are to be found in the case of *Kernaghan v. McNally*, 12 Ir. Ch. R. 89, which may appear to be opposed to this view, but if so they are directly in con-



flict with the more recent decision of *Paine v. Jones*, L. R. 18 Eq. 320, which has always been regarded as good law. The facts, however, in the Irish case were very intricate and peculiar, and the parties concerned proceeded upon a series of mistakes and misconceptions of their true position which it is very difficult to understand.

Judgment.  
BURTON,  
J.A.

It was very frequently before the Court in different shapes, and the extraordinary recitals which had crept into some of the conveyances, altogether opposed to the facts, may have had something to do with the decision.

A Mr. Alexander Nixon died in 1791, having made his will, whereby he devised to his executors and trustees certain lands, in trust for his eldest son, and the residue of his estate in trust for his six younger children, subject to certain charges.

After the making of the will, he acquired another property about which the litigation arose.

This property as the law then stood, did not pass by the will.

Immediately upon his death, the six children entered into possession of the property devised, and of this property, and remained in possession for over twenty years.

A judgment creditor of the testator obtained an administration decree under which the latter property was sold to one Rankin.

A reference was made as to title, and the Master found a good title, and the purchaser excepted to that report, and the Master of the Rolls allowed the exceptions, but on appeal from his order, Lord St. Leonards reversed it on the ground that the younger children had acquired a legal fee simple, and the purchaser was bound to take that title, and that the concurrence of the heir-at-law was not necessary.

After that decision, it is surprising to find that the conveyancer instead of preparing a conveyance from the six younger children alone, prepared a deed containing a recital that the legal estate was in Mr. Scott, the representative of the trustee under Alexander Nixon's will, and he was made a party to the deed, although he did not execute it.



Judgment.

BURTON,  
J.A.

Rankin the purchaser afterwards conveyed to Kernaghan, who subsequently conveyed all his property to trustees for the benefit of creditors.

The trustees sold to one Duffy, and on objection that the property was subject to the dower of Kernaghan's wife, an allowance of £200 was made to the purchaser, and he subsequently sold to the defendant.

Kernaghan having died, his widow instituted a suit for her dower, and it appearing upon the hearing that the deed I have referred to contained recitals that the legal estate was outstanding in a trustee, the Lord Chancellor dismissed the suit..

That judgment was appealed against to the Lords Justices and the Lord Chancellor, and he concurred with them in thinking it a case for further enquiry, and instead of putting the appellant to the expense of a new suit, ordered a reference to one of the Masters to ascertain whether Kernaghan was seised of the lands.

The Master having found that he was seised and the widow entitled, it was again brought before the then Lord Chancellor Brady, on exceptions to his report, who reversed his finding and held that although the younger children acquired the fee as against the heir-at-law, still as they had acquired it by virtue of a possession *taken as under the will* it operated not to vest the legal estate in the younger sons for their own purposes, but only to give them the interest which they would have taken if the land had passed by the will.

That does not strike me as a very happy way of expressing the relations between the children and the trustee. Even if they had gone into possession of land purporting to be devised under a will, valid or invalid, in either case, although they would have acquired the fee simple as against the heir-at-law, they would have been estopped as against the trustees and any others claiming under the will from disputing the validity of their title. But as the land never did pass under the will but vested at once in the heir-at-law who would, but for the adverse possession

Judgment.

BURTON,  
J.A.

of the younger sons, have still been entitled, it is difficult to understand by what process of reasoning the estate so acquired by them should be held to vest in the trustee. He never had any interest in this land. He could not have ejected the younger children. And although their possession had the effect of depriving the heir-at-law of his estate, that estate vested in them, and as the fiduciary relationship of trustee and *cestui que trust* never existed as to this land I do not see how that judgment can be supported at the present day.

I have referred to the cases cited by the Lord Chancellor in support of his judgment, and with great submission I think they do not support it. *Hawksbee v. Hawksbee*, 11 Ha. 230, was one of them and is a very simple case, but is no authority for the decision in the Irish case. The testator in that case had no title except his possessory title to the premises, but he assumed to devise them to trustees with power to sell them for the benefit of his wife and children. The widow had taken the benefit of the bequest, she could not therefore dispute her testator's title nor that of the children, and the eldest son by becoming tenant to her was estopped from disputing her title.

*Persse v. Persse*, 3 Ir. Ch. R. 196, in effect establishes the same doctrine, which is not at all disputed, that a possession taken in one right could not be changed into a possession founded on a different title.

The case of *Anstee v. Nelms*, 1 H. & N. 225, decides nothing more than this that the description was sufficient to pass the lands in Doynton, and that they did pass under the will, and that being so and the devisee having entered claiming a life estate could not on well established principles be allowed to say that that possession was unlawful, and give to the heir-at-law a right as against the remainderman.

The younger children may not have known that the property was not comprised in the will, but they had no title under the will and they could not by entering as they did, confer a title on a person who never had any title under the will.

Judgment.

BURTON,  
J.A.

In the present case there was no devise to the defendant beneficially of this land, and he never knew of or assented to the devise to him as trustee and his entry cannot be attributable to the will, but the moment he entered he was there adversely to the will.

There is some evidence, and if one could adopt it in face of the denial of the defendant, as I myself should feel disposed to do, it would establish, as I believe, the fact to have been that he was put into possession by his brother John Bell, not as co-trustee, but with a view of protecting the property from trespassers and affording him the means of a livelihood which he was unable to make in his profession, contemplating in all probability that the farm would be allotted to him at a valuation as his share on the ultimate division among the beneficiaries.

If that was the actual position of affairs it would be clear that the statute would have commenced to run in his favour, certainly at the expiration of one year from the time of the entry.

Can he be in a worse position, adopting his own version, because he took possession believing himself entitled when in fact he was not, and was therefore a trespasser from the first?

Something was said about an injunction, but there is no evidence of any such proceeding, or anything to warrant it beyond the mere suggestion of counsel, even if it would have been material, which, in my opinion, it would not have been. But so far from John Bell having taken any steps to obtain an injunction, the threatened proceedings were against John Bell himself, the defendant, and one John Conover on behalf of parties interested, presumably some of the parties who were, or thought they were, entitled as *cestuis que trustent*.

I do not agree in the view that under this will the defendant's entry could not have been tortious. That, with respect, seems to me to beg the whole question and to be founded on the fallacy that the estate vested at once in Joseph J. Bell, which I have shewn upon the authorities it did not.

If Joseph, knowing of the devise, had disclaimed and then entered, his possession would unquestionably have been wrongful. If he had entered knowing nothing of the terms of the will, it would have been still open to him, on learning the truth, to accept or disclaim. If he accepted no doubt his possession could not have been treated as tortious. But what if he refused to accept?—The will as to him and the grant to him as trustee was simply void as if it had never existed, and his possession, if for the full statutory period, would have barred the trustee and all claiming under him or through him as *cestuis que trustent*. Here he was in possession in ignorance of there being a devise to him as trustee, on learning of it he at once refused it.

I asked Mr. Blake at the hearing of the appeal whether he pressed his argument to the length of contending that if this defendant had entered in ignorance of this will and the statute had run for some time his then becoming aware of the fact of his being a trustee under the will would stop its running, and I understood him to contend that in every case in which it was known to the beneficiaries that he appeared to fill the position of trustee the statute would not run.

I fully admit the possible injustice that might arise from parties being deceived from this state of things, but I do not see how we could give effect to Mr. Blake's contention without adding to the words of the statute. But I do not think that the argument has any force in the present case. Whether the defendant entered *suo motu* or was put into possession by his brother the latter knew that his possession was ripening into a title, and if his title as trustee was barred, that of the *cestuis que trustent* would be barred also, and their remedy would be against the trustee for neglect of his duties.

I quite agree that a trustee in possession is in possession on behalf of his *cestuis que trustent*, whoever they may be; but the distinction I desire to draw is, that the defendant here never was trustee; he never had an opportunity to accept or disclaim until 1876; that when he became aware

Judgment.

BURTON,  
J.A.



Judgment.

BURTON,  
J.A.

of the fact that he was named as trustee, he disclaimed, and the authorities are very clear that the effect of that is to avoid the appointment altogether, and to vest the estate entirely in John Bell, as from the death of the testator, as fully as if no grant had ever been made.

I do not see any force in the argument with which we were pressed, that the defendant could not on discovering the truth, set up an adverse title until he had restored possession to the trustee for the estate. That doctrine has no application to such a case.

If he had obtained possession as trustee, time would not run as between him and his *cestuis que trustent*; he must have denuded himself of his character of trustee before he could claim adversely to them; but here he never was trustee, and therefore no fiduciary relationship ever existed, and his possession from the first was adverse.

I am of opinion therefore, upon this branch of the case that the defendant acquired a good title by possession.

Then as to the construction of the will.

The leading feature of the will is that the residue should be divided equally among a class, *i.e.*, his sons and daughters, if living at the time fixed for the period of distribution, or at the death of Deborah in the events which have happened.

It is clear that if all his other children had been then living, each would have been entitled to an equal share of this fund, but the gift was contingent and would have vested in such only of his sons and daughters as were living at the period of distribution but for the further provision that in the event of the death of any of them, the bequest was also to extend to the children of those of his sons and daughters who might have departed this life previous thereto. It is clear upon the authorities that the children of the deceased parent took a vested interest at the time of the parent's death, but the question is, what was the extent of that interest? Was it as the learned Judge has held, a right in each child of the deceased son or daughter to share equally with the sons and daughters



who survived, thus rendering a new division necessary and in its result producing the very inequality which it was the intention of the testator to avoid; or was it intended to leave the division as it would have been if all the sons and daughters had survived, but giving to the children of each deceased son or daughter the share which their parent would have taken if living?

Judgment.

BURTON,  
J. A.

I think the latter must have been the intention—that he meant equal benefit to each family, and that the fund should be divided into as many portions as there were sons or daughters living at the period of distribution, or who died leaving children, and that these children would take their parent's share.

It would seem to be a most improbable construction, and one it is difficult to believe the testator ever intended, to say that a son or daughter who survived, having a large family of children, and who *primâ facie* would appear to be entitled to say a one-sixth share, should have that share seriously diminished by reason of the remaining brothers and sisters having died previously, each leaving a very numerous family. It could scarcely have been intended to place the children of the deceased son or daughter in a higher or more favourable position than their parents, and that too at the expense of the surviving sons and daughters who were the immediate objects of the testator's bounty.

I do not think that the decision in *Martin v. Holgate*, L. R. 1 H. L. 175, at all conflicts with this view. As I understand that case, it merely decides that although the bequest there to the nephews and nieces was contingent upon their surviving the tenant for life, that to their children was not so, but was vested and immediate upon the death of their parents, as was also the devise in the present case contingent to the sons and daughters, and absolute as to their children who would take a vested interest immediately on the death of their parents; but I think only such interest as the parent would have taken.

Judgment.

BURTON,  
J.A.

It stands in a very different position from a bequest to A. and the children of B. Here no grandchild is to take except in the event of his parent dying, pointing I think very clearly to the testator's intention that he should take his parent's share and no more. See *Polley v. Polley*, 31 Beav. 363.

I think the estate should be divided between the surviving sons and daughters and the children of the deceased sons and daughters, the latter taking *per stirpes* and not *per capita*.

In the view I take of the matter, James Bell will not, having taken part of the estate adversely to the will, be entitled to participate in the proceeds of the Toronto property.

OSLER, J. A. :—

As regards the defendant James J. Bell's contention that he has acquired a title under the Statute of Limitations I think the appeal should be dismissed. I have examined the evidence with attention, and in my opinion it fully warrants what I must regard as the finding of FERGUSON, J., that the defendant did not take possession on his own behalf but as trustee under the will. He admits that he knew of the will, and he swears that he went in and took possession under it. Doubtless he also swears that he supposed the will devised the property to him beneficially. There is evidence, however, that he had at one time a copy of the will in his possession, and his profession as a lawyer, his position in his brother and co-trustee's office, the many opportunities he had of seeing the will, the natural interest he must have taken in his father's estate and affairs; in short, all the circumstances of the case justly lead to the inference that he knew of the will and of its contents. They at all events preclude us from interfering with the finding of the trial Judge on this point. And even if, contrary to all the probabilities of the case, we accept his statement that he

did not know of the provisions of the will, yet inasmuch as by his own admission he knew that there was a will and supposed that he was the beneficial devisee and made the will his title and the justification for his entry, he had constructive notice of its contents and cannot, in my opinion, be heard to say that he did not enter as trustee. On these grounds I am of opinion that this part of the judgment appealed from should be affirmed.

On the other question as to the construction of the will I agree, for the reasons given by my learned brethren, that the division of the estate must be *per stirpes* and not *per capita*, and that the appeal should to that extent be allowed.

Success and failure on each side being substantial there should be no costs of the appeal.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

On the question of the Statute of Limitations I agree with the judgment of the learned Chief Justice, and I would not have thought it necessary to add anything of my own, but that my learned brother BURTON takes a different view of the case.

With great respect, I think it would be a very unfortunate state of the law if a person entering and occupying land under the circumstances proved, and admitted by the defendant James J. Bell, could be allowed to set up the Statute of Limitations. No doubt it will be a hard case for the defendant to lose the land and the improvements he has made upon it, but he can blame no one for that but himself. If any one can believe, notwithstanding his evidence, that he, a practising lawyer, even if his practice was only as he says, chiefly in the Division Courts, took possession of the land as owner, because he was told that it was devised to him by his father's will, and yet never took the trouble to procure the will or a copy of it, and read it, and find out exactly what its provisions were, such neglect as that must go far to prevent sympathy for him in his loss. The learned trial Judge who heard him give his

Judgment. testimony, says he has arrived at the conclusion that the proper finding is, "that his entry on the land in 1861 was an entry by him as trustee under the will, concurred in and very probably first suggested by his brother John Bell, the main object being the protection of the lands from spoliation by strangers." It is so hard to believe that the defendant did not know the purport of his father's will before he took possession in 1861, when he was thirty-six years of age, nor until 1875, that the very slightest circumstance along with the admitted and undisputed facts, would be sufficient legal evidence that he did. I think there is evidence from which the learned Judge might well draw the conclusion which he expresses, and if that is so, it is an end of the case.

MACLENNAN,  
J.A.

I think, however, that if we take it, as contended for James Bell, that he really did not know until April or May, 1876, that the land was devised to him by the will upon trust, the law requires us to hold that the trust is now binding upon him and that he cannot set up the Statute of Limitations to defeat it.

What he says is this, "My father in his life time told me he was going to give me this land by his will, I knew he made a will, I knew my brother John was an executor, and he told me the land was devised to me; I was fifteen when my father died; I was brought up to the law, studied in my brother John's office, who was a lawyer; I practised for twelve years at different places, and after that, in 1861, I entered into possession of this land, as devisee under my father's will: I entered believing the land was devised to me beneficially, but I did not know that the devise was subject to any trust until 1875 when I first saw a copy of the will; I did not then disclaim or renounce but continued in possession of the land."

My learned brother Burton thinks that the principle of *Board v. Board*, L. R. 9 Q. B. 48, has no application to such a case as this. With great respect, I think it has, and that this is a much stronger case of estoppel than that. There a tenant by the curtesy made a will disposing of an estate



as if he were owner in fee, but in truth he had nothing that he could devise at all. He purported to give it to his daughter Rebecca for life, with remainder to his grandson William. Rebecca entered under the will and enjoyed the property under it in every way, shewing that she continued in possession because she was a devisee under the will. She then, after more than twenty years, conveyed in fee; and her grantee, after her death, disputed the right of the remainderman under the will, and set up the Statute of Limitations. It was held that Rebecca's vendee could stand no higher than Rebecca, and that she having gone in under the will was bound by its terms.

Judgment.  
MACLENNAN.  
J.A.

Lord Blackburn says the case is like that of a tenant coming in under a landlord; he is estopped from denying his landlord's title. The present case appears to me to be still stronger; it is the case of a man coming in under a will, and then disputing the will, or refusing to be bound by it. He entered thinking he was devisee, and that was the fact. It turns out that the devise was affected by a trust. I think he cannot be heard to deny the trust. I think it would be most dangerous to allow a man who takes possession under a will or other instrument, to say he was ignorant of some onerous condition or trust contained in it, and when he was called upon to perform the condition or trust, to repudiate the title under which he entered, and to set up the Statute of Limitations. Suppose for example it was a question whether a certain devise were a life estate or a fee. The devisee enters believing it to be a fee, and when after ten years it is decided to be merely an estate *pur autre vie* he sets up the Statute of Limitations.

It is to be borne in mind that, apart from the will, the defendant had no title whatever. He was either lawfully in under the will, or he was a mere trespasser. When the fact is, that there was a will, that he knew it, that under that will he had a right to possession, that he did take possession under the will, is it not impossible for a moment to allow him to say, "Oh, I did not go in under the will



Judgment. at all, I entered as a trespasser; I was a trespasser all  
MACLENNAN, the time, and I have now acquired title adverse to the  
J.A. will by the Statute of Limitations?"

The defendant lays great stress on his right to renounce and disclaim the trust; and that having done that by his answer, he can stand in all respects as if he had been all the time a total stranger to the will. But that argument, as I think, cannot be allowed. Any devisee may disclaim and renounce a devise; and on the same principle any devisee for life having entered and occupied for ten years and upwards, might do as the defendant is doing here, might say, "I never saw the will, never knew what its contents were, I now disclaim the devise, and I am owner in fee by length of possession." I think that would not be allowed, and he could not be heard to say that his possession was by wrong and not rightfully under the will: *Paine v. Jones*, L. R. 18 Eq. 320.

If it is said that, as a trustee under the will, he had not a right to possession, I deny that. The trustees were the persons to have the legal possession until the time for sale arrived. They might let it to tenants, but the possession of the tenants would be their possession still, and all that can be said is that the defendant did things by virtue of his possession, which he was not authorized by the will to do; but that did not make him any the less a person whose right and duty it was under the will to take and keep possession of the land.

There is another light in which the case may be viewed. If we concede that the defendant was in from 1861 as a mere trespasser—a mere stranger to the land, then he had acquired no title in April or May, 1876, when he first read the will, for the new Limitation Act did not come in force until the 1st of July of that year, and the twenty years had not elapsed. Now a trespasser on land is a trespasser every day—a trespasser *de die in diem*, and that is his situation until the last hour of the ten years, when his parliamentary title arises.

In *Ross v. Hunter*, 7 S.C.R. at p. 314, Mr. Justice Strong

says, "It is well settled that where an injury to property is actionable without proof of actual damage new suits for the damage caused by its continuance may be brought from day to day;" and see Addison on Torts, 6th ed., p. 360; Pollock on Torts, 1st ed., p. 313; 1 Wms. Saund., 20 (1): "The continuing of a trespass from day to day is considered in law a several trespass on each day." On the day therefore on which the defendant read the will, in April or May, 1876, if he was not in rightfully under the will he was a trespasser. In law he made a new entry on the land on that day; all his previous occupation went for nothing. That gave him no right to enter, or to remain. Having obtained knowledge of the will he chose to remain. It is the same as if with the will in his hand he entered for the first time. And I am of opinion that his remaining in possession after knowledge of the will is conclusive evidence of acceptance of the trust, and that he can make no use whatever of his previous trespass upon the land to rebut the inference of acceptance any more than if he had never seen the land before.

Judgment.  
 MACLENNAN,  
 J.A.

When a person intermeddles with property which does not belong to him, he does so at his peril. If a stranger intermeddles with the goods of a deceased person, he becomes executor *de son tort*, and may be sued as executor, and it will not avail him to plead that he is not executor. So if a person named executor acts without probate he may be sued: 1 Williams on Executors, 8th ed., pp. 314, 315; *Douglas v. Forrest*, 4 Bing. at p. 704, per Best, C. J.: "If he has acted as executor, he may be sued as executor whether he has proved the will or not."

In *White v. Barton*, 18 Beav. 192, at p. 195, Lord Romilly, M. R., held a person who was named executor, but had not proved, liable as such, using this language: "He is one of the executors; he has never proved, but he has never renounced, and he says he has never acted in the trusts; but the Court must look at his actions and see to what character they are attributable. I think he has acted in the character which the testatrix had given him."

Judgment. In *Lister v. Pickford*, 34 Beav. 576, the same learned Judge, at p. 582, said, "A trustee who is in possession of land is so on behalf of his *cestui que trust*, and his making a mistake as to the persons who are really his *cestuis que trustent* cannot affect the question. Suppose that they had imagined, *bonâ fide*, that they themselves were personally entitled to the property, and that they were not trustees of it for anyone, it would nevertheless have been certain that they would have been trustees for the *cestuis que trustent*, and no time would run while they were in such possession."

I think these cases shew that the principle of law is that when a man intermeddles with property, real or personal, he is estopped from saying he did it wrongfully if he could have done it rightfully. And so I think the defendant's entry upon those lands, which he had no right to enter upon at all except under the will, was a conclusive acceptance of the trust whether he knew the terms of the will or not. He was named executor and trustee in the will. He did acts which he could not lawfully do except as such executor and trustee, and he can not be heard to say that he did them otherwise than in that character.

I think too the authorities are clear that apart from the registry laws, persons dealing with lands who have notice of the existence of a deed or instrument relating to the land, are affected with notice of the contents of the deed or instrument: *Hall v. Smith*, 14 Ves. 426, 434; *Neesom v. Clarkson*, 2 Ha. 163. Here the defendant admits that he knew of his father's will, and even asserts that it was under the will he took possession, believing, as he says, that the land was devised to him. It follows from the authorities that he must be regarded as having entered with full knowledge of the contents of the will, and that he is estopped from contending the contrary.

There is another ground on which, in my opinion, the judgment may be supported. Assuming for the purposes of this argument that James Bell was no trustee, and a mere stranger to the land, the legal title was in John Bell from the death of the testator till the year 1861, and he

in the eye of the law was in possession. In that state of circumstances, I think it is the proper conclusion from James Bell's evidence that John Bell put him in possession of the land. He gives the following evidence :

[The learned Judge read the evidence already set out and continued:]

I think all that is evidence that James Bell entered into possession of these lands under his brother John, as executor and trustee of his father's will, and that he did not enter as a mere stranger, and if so the defendant James is a person claiming the land in question though the trustee John Bell within the meaning of section 30 of the Limitations Act, R. S. O. (1887) ch. 111, and not being a purchaser for valuable consideration he cannot claim the benefit of the statute against the plaintiff. I do not think it makes any difference whether the defendant was tenant at will or at sufferance to John Bell. The latter had the legal title, and the other entered at his suggestion, and with his consent and permission, and could defend his possession at law under him against all the world beside, and therefore was a person in possession claiming through John Bell who had the legal title.

It remains to consider the other ground of appeal, namely, that the division of the estate should be between the surviving children of the testator and the children of those who are deceased *per stirpes* and not *per capita*.

I am with great respect of opinion that the appeal on that point ought to succeed.

The ground on which I have, after much doubt and hesitation come to that conclusion, is this. The estate was to be sold and divided, after the death of the testator's widow, and upon the marriage or death of all his daughters. The widow did not long survive the testator, and the daughters might all have married within a very short time after his death. If that had happened the estate might have fallen to be divided during the lifetime of all the children, and in that event each would have taken one ninth. The postponement of the division has been caused



Judgment. by one of the daughters never having married, and having  
MACLENNAN, lived to a great age, so that the estate is only now to  
J.A. be divided fifty years after the testator's death.

All the testator's sons and daughters survived him, and all had a chance of obtaining a share of the residue. If all had lived until the time of division, none of the grand children would have taken anything, no matter how numerous they were. Each parent takes if living, and the children of any child take only in the event of the parent's death. It is not a case of substitution in the ordinary sense, for that only occurs where there is a gift to the parents. Here there is no gift to the parents who have died, for the gift is to a class to be ascertained at the time of division; and as Lord Westbury says in *Martin v. Holgate*, L. R. 1 H. L. at p. 188, such a gift is contingent and vests in such only as are living at the time of division. But although the gift is not strictly substitutional, I think its character affords ground for holding that the division should be *per stirpes*. If it were strictly substitutional, then on the authorities, that would be conclusive in favour of a stirpital division; and I think that inasmuch as here no grandchildren can be included in the class of legatees, except in the case of their parent's death, the inference is irresistible that the testator intended them to take no more than their respective parents would have taken if living. I think the reason which governs in a case of substitution proper, applies in this case, and that the construction should therefore be the same, at all events in a case such as this, where the time for ascertaining the class might arise very soon after the testator's death, or might not arise, as has actually happened, for nearly half a century.

*Appeal allowed in part, and, BURTON, J. A., dissenting, dismissed in part.*

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## WOOD V. JOSELIN.

*Assignments and Preferences—Division Court—Garnishment of debt—Subsequent assignment by primary debtor—Priorities—R. S. O. (1887), ch. 124, sec. 9.*

An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him and the garnishee, and judgment has been obtained thereon against the debtor, does not intercept or take precedence of the attachment of the debt, and the primary creditor may obtain judgment against and enforce payment thereof by the garnishee.

Judgment of the First Division Court of York reversed.

THIS was an appeal by the plaintiff in a garnishee action Statement. from the judgment of the First Division Court of York discharging the garnishee, and came on to be heard before OSLER, J. A., on the 27th of September, 1890.

*G. F. Shepley*, Q. C., for the appellant.

*J. F. Woodworth*, for the respondent.

October 18th, 1890. OSLER, J. A. :—

The action was brought by the plaintiff as primary creditor against Joselin as primary debtor, and Sheppard, garnishee, under the appropriate clauses of the Division Court Act, the primary creditor's claim not being a judgment. The summons was duly served upon the parties on the 30th and 31st January, 1890, and judgment was obtained against the primary debtor on the 14th of February. The case was adjourned as against the garnishee pending the trial of an action against him by the primary debtor in the High Court for the debt, part of which was attached in the present suit. Judgment was recovered in the High Court suit against the garnishee in April, and on the 5th of May the primary debtor made an assignment under the Assignments and Preferences Act to one Summerfeldt, who thereupon gave notice to the plaintiff in this suit that he claimed the debt so attached by him.

Judgment.

OSLER,  
J.A.

Thereafter the case came on at an adjourned hearing against the garnishee, and the judgment appealed from was given discharging him from the suit on the ground that the assignment took precedence of the attachment, and the plaintiff was ordered to pay the garnishee's costs.

The question is whether an assignment under the Act does intercept or take precedence of such an attachment.

It is clear that the service of the garnishee summons does not create as between garnishor and garnishee, any debt either at law or in equity, and does not operate to any extent as an assignment or transfer of the debt to the garnishor: *Chatterton v. Watney*, 17 Ch. D. 259; *In re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99.

Nevertheless, unless section 9 of the Assignments and Preferences Act applies, the effect of service of the order or summons (it will be understood that I am speaking of the summons under sections 185 *et seq.* of the Division Courts Act) is to prevent the debtor from dealing with the debt to the prejudice of the garnishor, who has obtained a statutory right which he is entitled to follow out to its legitimate results. If, therefore, it is to be intercepted by the subsequent assignment and the garnishor deprived of the right thus acquired it must be because his case comes plainly within the provisions of the 9th section. But for that section it is manifest that the assignee could only take what the debtor could give him, and that he would take subject to any rights which creditors had acquired against the property.

It may be conceded that an attaching order or summons is a species of execution—an execution against a debt. That is so held and it is so described in *In re Stanhope Silkstone Collieries Co.*, 11 Ch. D. 160, with reference to its effect. But in common parlance we do not speak of it as an execution but as an attachment, and we see in the English Bankrupt Acts containing provisions cognate to the 9th section of our Act that the distinction is maintained and the case of execution and attachment expressly pro-

vided for : *Ex parte Pillers*, 17 Ch. D. 653 ; *Butler v. Wear-* Judgment.  
*ing*, 17 Q. B. D. 182.

OSLER,  
 J.A.

Giving all due weight to the fact no doubt apparent on the face of the *quasi* insolvent legislation found in the Assignments Act and the Creditors' Relief Act, that the object of the Legislature is to prevent one creditor from obtaining by preference or otherwise an advantage over others, we must nevertheless see that the language of the 9th section, fairly treated, embraces this case. I think that the reference to the execution in the sheriff's hands, and the special provisions as to the costs of the execution creditor shew that the executions therein referred to are executions ordinarily known as such—executions placed in the sheriff's hands under which the assignor's goods or lands may be seized and sold. It appears to me that the case of an attachment of a debt was not present to the mind of the Legislature, that it has not been provided for, and therefore that the right of the attaching creditor has not been taken away.

Grotesque and unjust as are the provisions of the Act in some respects as regards the ordinary execution creditor, they would, if he were within them, be doubly so as regards an attaching creditor. The execution creditor by *fi. fa.* has a judgment for his debt, the costs of which he is entitled to recover from his debtor if he can ; they are and remain a debt, and he can prove for them as such against the estate in the hands of an assignee if he has not been able to enforce payment in full under his execution. On the other hand if the garnishor is cut out by the assignment and the attaching order or summons discharged, the costs which he has lawfully incurred are lost to him, and he may even, as in the case before me, be ordered to pay the costs of a proceeding against which, until the execution of the assignment, the garnishee had no defence whatever. Nay, if the attaching order is an execution within the meaning of the section, a final order to pay over may have been made, or judgment recovered against the garnishee in a contested issue as to the debt, and execution

Judgment.

OSLER,  
J.A.

against him placed in the sheriff's hands, and yet as against the original debtor, the execution by way of attachment not having been completed by payment of the debt, it would probably follow that all these proceedings would go for nothing. The creditor must lose his costs, and the assignee, since he cannot take the benefit of the proceedings, must bring his own action for the debt, the liability for which has already been tried between the garnishor and garnishee. Upon the whole, and having given the case the consideration which I feel was only due to the careful judgment of the learned Judge of the Division Court, I have come to the conclusion that the appeal must be allowed.

It was contended by Mr. Shepley that section 9 was *ultra vires* the Legislature. I am glad to find a way of disposing of the case without entering upon that question.

I do not notice anything in the Creditors' Relief Act which affects the general question argued and decided. That Act does not apply to a Division Court execution or executions where there is no execution from the High Court or County Court in the sheriff's hands against the defendant.

The garnishor must have judgment in the Court below for his debt, with costs, and also the usual costs of this appeal.

*Appeal allowed with costs.*

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## BALDWIN V. KINGSTONE.

*Will—Construction—Heir-at-law—Change in law after will made—Primogeniture—Mistake—Laches—Acquiescence—Family arrangements—Tenants in common—Statute of Limitations.*

A testator, by his will made on the 14th of August, 1850, devised certain land to his widow for life, and after her death to two nephews, and in the case of the death of them, or either of them, in his own lifetime he devised the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 and 15 Vic. ch. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858 leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870 :—

*Held*, [GALT, C. J., C. P., dissenting,] affirming the judgment of ROBERTSON, J., 16 O. R. 341, that the Act abolishing primogeniture did not apply (1) because the will was made before it was passed or took effect, and (2) because the land had been lawfully devised by the person who died seised, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow.

*Tylee v. Deal*, 19 Gr. 601, approved.

Upon the death of the testator's widow the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew and one-sixth to each of the others. In 1885 a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside and the rents and proceeds of sales received by the brother and sister repaid to him :—

*Held*, affirming the judgment of ROBERTSON, J., 16 O. R. 341, that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will the plaintiff was not barred by laches or acquiescence from recovering any portions of the land unsold at the time his claim was made, and any mortgages to secure purchase moneys of land previously sold and held by the defendants at the time his claim was made, and any moneys received by them after that time, but that there could be no recovery back of the moneys actually received by them before notice of the claim.

*Cooper v. Phibbs*, L. R. 2 H. L. 148; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; and *Rogers v. Ingham*, 3 Ch. D. 351, considered and followed.

*Held*, further, in this also affirming the judgment of ROBERTSON, J., 16 O. R. 341, that as there was no consideration therefor and no compromise or settlement of any disputed question the partition deed and other dealings could not be supported as in the nature of family arrangements :—

*Held*, also, [GALT, C. J., C. P., dissenting], reversing the judgment of ROBERTSON, J., 16 O. R. 341, that the eldest son having always received a share of the rents and profits of the undivided moiety was in law always in possession of the whole of that moiety and therefore that no title had been acquired against him by the brother and sister under the Statute of Limitations.

Statement.

THIS was an appeal by the plaintiff from the judgment of ROBERTSON, J., reported 16 O. R. 341.

The plaintiff claimed that as the eldest son of the late Hon. Robert Baldwin, he was, under the will of the late Hon. Augustus Warren Baldwin, entitled to certain property in the city of Toronto, to the exclusion of his brother and sister who had, until shortly before the bringing of the action, been looked upon as tenants in common thereof, and he asked that a certain partition deed entered into between himself and his brother and sister might be set aside, and that certain moneys received by them as rents and profits of the land in question might be paid by them to him. The plaintiff's sister, the defendant Mrs. Ross, and the representatives of his deceased brother Robert Baldwin, defended the action, alleging that upon the true construction of the will the plaintiff was not sole heir, but merely tenant in common with them, and that at all events any rights the plaintiff might originally have had, had been lost by his laches and acquiescence, and also under the Statute of Limitations. They also alleged that the dealings in question were in the nature of family arrangements.

The will in question was made on the 14th of August, 1850, and the material clauses were as follows:—

“3rd. I devise to my beloved wife that parcel of land with the messuages and buildings thereon called and known as Russell Hill, being lot twenty-three, in the second concession from the Bay, west of Yonge street, in the township of York, in the county aforesaid, for and during her natural life.

“8th. After the death of my said wife, I devise the land, messuages and buildings aforesaid known as Russell Hill, to my nephews, the Hon. Robert Baldwin and William

Augustus Baldwin, sons of my brother, the late Hon. *Statement.* William Warren Baldwin, deceased, their heirs and assigns forever, or in the case of the death of them or of either of them in my own life-time, then I devise the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns."

The Act commonly known as the Act abolishing primogeniture, 14 & 15 Vic., ch. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. The Hon. Robert Baldwin, one of the nephews of the testator, died on the 9th of December, 1858, leaving him surviving four children, viz: Phœbe Maria Baldwin, William Willcocks Baldwin (the plaintiff), Robert Baldwin, the younger, and Augusta Elizabeth Ross. The testator died on the 5th of January, 1866; his widow in 1870; and Phœbe Maria Baldwin, intestate and unmarried, before the widow.

The following admissions were made for the purposes of the action, and in these admissions the material facts are set out. In several of the leases and sales referred to there were recitals as to the supposed co-tenancy:—

1. That at the date of the death of Augusta Melissa Baldwin, widow of the Hon. Augustus Warren Baldwin, the plaintiff herein, and the defendant Mrs. Ross, and Robert Baldwin, deceased, were the sole surviving lawful children of the late Hon. Robert Baldwin.

2. That immediately upon the death of the said Augusta Melissa Baldwin, the defendant Mrs. Ross, and Robert Baldwin, deceased, entered into possession and enjoyment of the Russell Hill property and into the receipt of the rents, issues and profits thereof along with the plaintiff, under the belief that they were tenants in common of one undivided moiety thereof under the will of Augustus Warren Baldwin; William Augustus Baldwin, the brother of the late Hon. Robert Baldwin, being entitled to the other undivided moiety thereof.

3. That from the time of the death of the said Augusta Melissa Baldwin the said William Augustus Baldwin, the

Statement. plaintiff, the defendant Mrs. Ross, and Robert Baldwin, deceased, continued in the possession and enjoyment of the said property and in receipt of the rents, issues and profits.

4. That the plaintiff, the defendant Mrs. Ross, and Robert Baldwin, deceased, joined in sales and in the execution of conveyances of portions of the said Russell Hill property, and granted and executed leases of other portions thereof, and the defendant Mrs. Ross and Robert Baldwin, deceased, were in all respects dealt with and treated by the plaintiff and the said William Augustus Baldwin as if they were tenants in common with them of the said property and as such entitled to shares therein and of the rents, issues and profits thereof and to deal with the same and with shares therein in the same manner as the plaintiff and the said William Augustus Baldwin could or did deal with shares therein.

5. That the several sums of money mentioned in the statement of claim herein were divided and received by the above named plaintiff and the defendant Mrs. Ross and Robert Baldwin, deceased, in the proportions of one-third to each and as if they were entitled thereto as tenants in common of a moiety of the said Russell Hill property and of the proceeds, issues and profits thereof.

6. That during the times during which the above dealings and transactions took place all parties acted in good faith and there was no concealment of any kind.

7. That the defendant Mrs. Ross upon the faith and understanding that the moneys received by her from and in respect of the Russell Hill property, and in the belief that she was entitled to deal with them as her own has made outlays and expenditures for herself and family and therein has expended the moneys so received by her before she had any intimation or knowledge of the claim now made by the plaintiff in this action.

8. That the said Robert Baldwin, deceased, during his life-time upon the faith and understanding that the moneys received by him, from and in respect of the Russell



Hill property, and in the belief that he was entitled to <sup>Statement.</sup> deal with them as his own, made outlays and expenditures for himself and family and therein expended the moneys so received by him and departed this life without having any intimation or knowledge of the claim now made by the plaintiff in this action.

In 1878 a partition deed of a portion of the property was executed by all the parties, and in 1885 another partition deed of another portion of the property was so executed. In May, 1886, objection to their title was taken, on behalf of a purchaser from Mrs. Ross and Robert Baldwin of their interests in a portion of the undivided lands, and the question of title was then for the first time brought to the notice of the plaintiff, who soon afterwards commenced this action. The sale was, by consent, carried through and the purchase moneys were deposited in banks to abide the result of the action.

The action was tried at Toronto before ROBERTSON, J., who, while deciding all other points in favour of the plaintiff, dismissed the action as barred under the Statute of Limitations.

The plaintiff appealed, and the appeal came on to be heard before this Court (BURTON, and OSLER, JJ.A., GALT, C.J., C.P., and FERGUSON, J.) on the 8th, 9th and 10th of April, 1890.

*Robinson, Q. C., and H. Cassels*, for the appellant. The judgment in the Court below dismissing this action proceeds upon the ground that the appellant is barred by the Statute of Limitations, but we submit that that is not so. The learned Judge relied upon the case of *In re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553. This case, however, is inapplicable. It was a case between tenants in common, and in it the tenant in common who was held to be barred by the statute had been out of possession altogether. Here the respondents, as the learned Judge himself holds, are not tenants in common at all with the appellant, and the appellant has never been out of possession. This case

Argument.

must be dealt with as if it were the case of a man in possession allowing a stranger to be in possession jointly with him, and in a case of that kind it is quite clear that the true owner would never be barred: *Reading v. Rawsterne*, 2 Ld. Raym. 829; 2 Salk. 423; *Groves v. Groves*, 10 Q. B. 486; *Orr v. Orr*, 31 U. C. R. 13; *Fraser v. Fraser*, 14 C. P. 70; *McArthur v. McArthur*, 14 U. C. R. 544; *Foley v. Foley*, 26 Gr. 463; *McKinnon v. McDonald*, 11 Gr. 432; *Agency Co. v. Short*, 13 App. Cas. 793; *Smith v. Lloyd*, 9 Exch. 562; *Lister v. Pickford*, 34 Beav. 576. A title to an undivided interest cannot be acquired under the statute. It is impossible to say to what particular portions of the land in question the portions of the rents received by the respondents are attributable. The case would be different if the respondents had received the rents from some specific portions of the lands. In that case the appellant would, we admit, be barred, but here the appellant, the true owner, has always been in possession, and that being so, no one else can acquire a title as against him. The respondents rely upon the case of *Williams v. Williams*, L. R. 2 Ch. 294, but that case turned upon a question of family arrangement and the statement as to the possible acquisition of title under the statute by the person who was erroneously supposed to be a tenant in common was a mere dictum of the Lord Chancellor, the point not being alluded to by the Lord Justice or by any of the eminent counsel who were engaged in the case.

The appellant also contends that he is entitled to repayment of all moneys received by the respondents as rents and profits of the lands in question. *Rogers v. Ingham*, 3 Ch. D. 351, relied on in answer to this claim, turns really on the fact that there was a dispute there as to the construction of the will, and an arrangement in the nature of a family arrangement was entered into. Here the plaintiff admittedly acted in ignorance of his rights, and nothing in the nature of a family arrangement was entered into, so that the only answer to the claim for repayment of the rents and profits received by the respond-

ents would be an answer under the Statute of Limitations. Argument. See Law Quarterly Review, Vol. I., p. 298, where the English and American authorities are reviewed. But this statute, as far as moneys paid over are concerned, would only begin to run from the time of the discovery of the mistake: Story's Equity, 13th ed., sec. 1521 (*a*), and the appellant is therefore in time.

*Irving, Q. C., McCarthy, Q. C., and G. M. Evans*, for the respondents Kingstone and Macdonald. The Statute of Limitations applies to and reaches this case. *Williams v. Williams*, L. R. 2 Ch. 294, cannot be distinguished, and we submit is a binding authority. On principle moreover it would seem clear that the respondents, having for more than the statutory period received, to the exclusion of the plaintiff, specific shares of the rents and profits, have acquired title to what the shares of the rents represent, that is to shares of the land itself. In all the cases cited by the appellant there was actual possession by the true owner of the whole of the property in question. Here however neither the appellant nor the respondents have been in actual possession of the land, but the possession has been in tenants and the respondents have been in receipt, to the exclusion of the appellant, of shares of the rents and profits for more than the statutory period. If the plaintiff had himself received one-half of the rents and profits, and had then paid over to each of the respondents one third of that half that would have given each of the respondents a title: *Paine v. Jones*, L. R. 18 Eq. 320; *Williams v. Pott*, L. R. 12 Eq. 149; *Jacobs v. Seward*, L. R. 5 H. L. 464. The respondents contend however that on the true construction of the will in question they are tenants in common with the appellant of one undivided half of the property in question. Upon this point the learned Judge in the Court below followed *Tylee v. Deal*, 19 Gr. 601. That case, even if rightly decided, does not govern in this Court, and is in any event distinguishable. There the change in the law took place very shortly before the testator's death and the will in question

Argument. affected land not only in this country but in England. Here the testator lived fourteen years after the change in the law took place and must be presumed to have intended that his will should take effect according to the new law. The heir or heirs could not be ascertained till Robert Baldwin's death, and at the date of his death the Act in question said that all his children were his heir or heirs. The will it is true takes effect from its date as far as the property devised is concerned, but to settle to what member of a fluctuating class the property devised goes, the will must be read as at the date when the chance of fluctuation ceases, and in the present case that was at the time of the death of Robert Baldwin: *Jarman on Wills*, 4th ed., pp. 318, 336, 337; *Sturge v. Great Western R. W. Co.*, 19 Ch. D. 444; *Hasluck v. Pedley*, L. R. 19 Eq. 271; *Constable v. Constable*, 11 Ch. D. 681; *Lawrence v. Lawrence*, 26 Ch. D. 795; *Capron v. Capron*, L. R. 17 Eq. 288. This is not changing the constrution, but merely the operation.

If the legal effect of the will is that contended for by the appellant still a different construction has been put upon it by the parties, and in numerous instruments signed and sealed by the appellant the will has been construed as the respondents claim, and it now too late for the appellant to disturb that construction. Moreover the dealings between the parties have been in the nature of a compromise or family arrangement and should not now be disturbed: *Lansdowne v. Lansdowne*, 2 J. & W. 205; *Stapilton v. Stapilton*, 2 W. & T. L. C. 6th ed., 920; *Cann v. Cann*, 1 P. Wms. 567; *Pullen v. Ready*, 2 Atk. 587. There has been no such mistake as to justify the setting aside of the partition deed. Mistake of law is not sufficient: *Midland Great Western Railway of Ireland v. Johnson*, 6 H. L. C. 798. Certainly to the moneys which have been actually, with his knowledge and consent, paid to and received by the respondents the appellant has no claim. Mistake of law is not a ground of relief as to them: *Pollock on Contracts*, 5th ed., p. 437; *Rogers v. Ingham*, 3 Ch. D. 351.



*Moss*, Q. C., and *W. Barwick*, for the respondent Ross. **Argument.** The respondents have been in possession of their shares of the rent in question from the first as of right, and not, as in the cases cited by the appellant, by the consent or invitation of the plaintiff or as caretakers. They have therefore in law been in possession of these shares to the exclusion of the appellant and the statute runs against him. *Ward v. Ward*, L. R. 6 Ch. 789, shows that a stranger may acquire an interest with a tenant in common and that is what the respondents have here done.

In *Tylee v. Deal*, 19 Gr. 601, it was held that the 5th section of the Act abolishing primogeniture excluded the operation of the statute as far as that particular will was concerned, but section 5 does not apply to this case because it is not the heir of the testator but the heir of another person who is to be ascertained. Nor does section 41 apply because this is not a "limitation" by will. The word "heir" is a word of purchase. The section providing that the Act should not apply in certain cases was merely intended to keep the law unchanged as to trust estates and estates tail: *Leith's Blackstone*, 2nd ed. p. 191.

*Robinson*, Q. C., in reply. This will must be construed according to the law as it was at the time it was made, and the Act abolishing primogeniture, subsequently passed, cannot affect it: *Jones v. Ogle*, L. R. 8 Ch. 192; *In re March*, *Mander v. Harris*, 24 Ch. D. 222; 27 Ch. D. 166; *Gilmore v. Shooter*, 2 Mod. 310; *Battle v. Speight*, 9 Ired. 288; *Carroll v. Carroll*, 16 How. 275. It is clear that if construed according to the law as it then stood the appellant, as the eldest son and common law heir of the Hon. Robert Baldwin, was his heir-at-law. Even in the case of a devise of land held by copyhold or gavelkind tenure the common law heir would take: *Garland v. Beverley*, 9 Ch. D. 213; *Thorpe v. Owen*, 2 Sm. & G. 90. But in any event the Act abolishing primogeniture applies only to cases of intestacy and not as here to a case where a will is made, and the Act, 43 Vic. ch. 14, sec. 2 (O.), shows that the appellant's contention is correct. If the statute is held to apply

**Argument.** then it effects an alteration in the construction of the will and causes the estate to go to three persons instead of to one, but such a change of construction cannot be allowed. Suppose the statute had said that a man's nephew should take his real estate in case of intestacy:—Could it be contended that under this will the nephew of the deceased nephew would take? But the respondents must go that length. This is a limitation by will within the meaning of the Act. The beneficiary takes by purchase, it is true, but an estate may be said to be "limited" although taken by "purchase:" Theobald, 3rd. ed., p. 312; Wharton's Law Lexicon—"Limitation," "Purchase."

It is clear that the appellant in executing the partition deed and in the other dealings that have taken place was acting in ignorance of and under mistake as to his legal rights and he is therefore not barred: *Cooper v. Phibbs*, L. R. 2 H. L. 149; *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223; *Willmott v. Barber*, 15 Ch. D. 96; *Kintore v. Kintore*, 11 App. Cas. 394.

There was no dispute or compromise and no consideration given for the deed and other dealings and without one of these elements the doctrine of "family arrangement" cannot be invoked: *Williams v. Williams*, L. R. 2 Ch. 294; S. C., Brett's L. C. p. 207.

The fallacy of the respondents' argument as to the application of the Statute of Limitations lies in their assumption that the respondents were tenants in common with the appellant and taking more than their proper shares. Granted that the appellant was true owner and this argument falls to the ground: *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42.

October 3rd, 1890. BURTON, J. A. :—

The late Admiral Baldwin, by his will dated 14th of August, 1850, after devising the property known as Russell Hill to his wife for life, disposed of it in these terms :

[The learned Judge read the clause and continued:]

The question is, Robert Baldwin, one of the nephews, having predeceased the testator, who is or are the person or persons to take under the devise to the heir or heirs-at-law of the deceased nephew?

Judgment.

BURTON,  
J.A.

Dealing with the question as it would have stood before the passing of the Act abolishing primogeniture, (14 & 15 Vic. ch. 6) which was passed shortly after the making of the will, and came into effect on the 1st of January, 1852, there can, I think, be no doubt that what was meant was, the person or persons who would be at the time of the late Robert Baldwin's death, his heir or heirs at common law, and who survived the testator.

It would seem to be established that even though the subject of the devise be gavelkind land, Borough English land, or customary land, personal or leasehold estate, and the devise be to the heir, the word means the common law heir.

The distinction is pointed out very clearly by Lord Justice Fry, referring to very old authorities, in *Garland v. Beverley*, 9 Ch. D. 213, and he quotes from Lord Coke in these terms: "If lands of the nature of gavelkind be given to B. and his heirs, having issue divers sons, all his sons after his decease shall inherit, but if a lease for life be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law. So note a difference between a purchase and a descent."

And Mr. Hargrave in the note to that passage explains it thus: "The reason seems to be that though the subject of the gift is customary land the heir at common law is presumed to be meant unless words are added to describe the customary heir. But if such special words are used the presumption fails, and then it is said that though the subject of the gift is common law land, yet the customary heir shall be preferred."

I have referred to these cases merely to shew that if the word "heir" be used in a will as one of limitation then the heir or heirs, according to the peculiar tenure, will take;

Judgment.

BURTON,  
J.A.

but when it is used as here, as a word of purchase, the person answering that description is the common law heir, even in the case of gavelkind or other peculiar tenure and *a fortiori* where the devise is of common law land. See *Thorp v. Owen*, 2 Sm. & G. 90.

I repeat, therefore, that at the time of the making of the will the common law heir was intended.

If this would have been the proper construction of the will, had the testator died before the passing of the 14 & 15 Vic. ch. 6, Robert Baldwin having predeceased him, can that construction be affected by the circumstances of that Act having come into operation many years before his death, Admiral Baldwin having lived until the 5th of January, 1866, and his widow, the tenant for life, till 1870?

The contention of those now representing the deceased brother and the sister of the eldest son is that the effect of that statute being to abolish primogeniture they became equally with him the heirs-at-law of Robert Baldwin, and entitled to share the property with him.

I am unable to take that view of the effect of the statute, or to suppose that the Legislature ever intended to make a new will for persons who had disposed of their property by will in a particular way, and give it to persons who certainly were not intended by the testator at the time he made it.

I should have thought it clear, but for some remarks to which we were referred on the argument, and to which I shall again presently refer, that the words used in this will in reference to the person designated as the devisee, could not be affected by the Act of Parliament.

The remarks of Lord Selborne, in *Jones v. Ogle*, L. R. 8 Ch. 192, as to applying the rules of construction which prevailed when the will was made, and with reference to which wills may fairly be presumed to have been framed, appear to me to have great weight, and were referred to by the Court of Appeal as being unanswerable in *In re March, Mander v. Harris*, 27 Ch. D. at p. 169. Lindley,



L.J., there refers to the difficulty in seeing his way to the conclusion that an Act of Parliament was intended to alter or had the effect of altering the proper construction of words contained in a will before the Act passed.

Judgment.

BURTON,  
J.A.

As the effect of the devise to the heir in this will would have been, but for the 14 & 15 Vic. ch. 6, to give the estate to the appellant absolutely, it seems difficult, in accordance with this reasoning, to hold that he is to be deprived of it and the estate divided among others by an Act subsequently passed, however general in its terms; but that this Act can have no such operation is, I think, clear, when we consider that it was passed and professes to deal only with cases of intestacy, and excludes in express terms all cases wherein the party seised of the land had dealt with it by will.

The remarks to which I have above referred as at first causing a doubt in my mind were made, it is true, by one of the greatest lawyers of modern times, but when carefully considered will be found, I think, not to have the wide and general meaning contended for and sometimes attributed to them but to be confined to the effect of the particular Act then under consideration—the Apportionment Act—an Act dealing generally with all rents, annuities, dividends, and other periodical payments in the nature of income, whether reserved or made payable under an instrument in writing or otherwise, which were, from the time of the passing of the Act, to be considered as accruing from day to day and apportionable. But by the 7th section it was declared that the provisions of the Act should not extend to any case in which it is or shall be expressly stipulated that no such apportionment shall take place.

It was urged in a case under the Act, decided in 1884, that the Act could have no operation on a will when the will had been drawn at a period, and the testator had died at a period, at which he could not by any possibility have known that the Act would pass. But it was held that the words being general the Court had no power to control

Judgment.

BURTON,  
J.A.

them, and unless there were words in the will controlling the apportionment, whether made before or after the passing of the Act, the general terms of the Act would apply.

That, I have no doubt, was the view of Sir George Jessel, in the case in which he made the remarks I am about to quote, dealing, it must be borne in mind, with the subject matter of the devise, as to which the will spoke from the death, and included after acquired property. This was his language: *Hasluck v. Pedley*, L. R. 19 Eq. at p. 273.

"It is said that testators make their wills on the supposition that the state of the law will not be altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is that a testator who knows of an alteration in the law (as this testator," he adds, "must be presumed to have done) and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law."

As applied to the particular matter with which he was dealing perhaps such a presumption might exist, but I should prefer not to place it on such a ground, but rather on the ground that here was a general law regulating the apportionment of rents, &c., where the owners of the property who had entire control of them had failed to deal with them, and this is evidently the view taken by Sir George Jessel in a subsequent sentence, which is much more convincing to my mind than the variable one of a presumption arising that any particular testator at any longer or shorter period of time became aware of a change in the law, when he says: "The Act does not affect the meaning of the will, it only alters its legal operation. A devise of Blackacre before the Act carried the accruing rents, now it does not, not because the meaning of Blackacre has been altered, but because the legal effect of the devise is different."

This, I think, furnishes the key to the remarks; the Act applied to all rents and payments of the nature mentioned in it; and although the testator might, by apt words, have

excluded the operation of the Act, he had omitted to do so, and whilst the land devised passed, the arrears of rent did not.

Judgment.

BURTON,  
J.A.

It is not necessary in the view I take of the case, and I therefore abstain from offering any opinion as to what would have been the effect of the devise in these terms had the will been executed after the passing of the Act abolishing primogeniture, and before the Act of 1880 (43 Vic. ch. 14, sec. 2), which now sets the matter at rest as to all wills made after that date; but I am unable to bring myself to think that the Act of 1851 could affect a will made before its passing, even if alone and without the aid of the Act of 1880 it would have just the same operation as is now given by that statute upon wills subsequently made.

The Act is in terms confined to cases in which a party dies seised of land without having devised the same. Here the person so seised had lawfully devised the same at the time the Act came into operation, and the only interpretation I can place upon it is that the will and the devise to the heir or heirs of Robert Baldwin stand in precisely the same position as if the Act of 1851 had not been passed.

But the learned Judge held that the plaintiff's claim to the land was barred by the Statute of Limitations, under R. S. O. (1877), ch. 108, sec. 11, and he bases his decision mainly on a case of *In re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553.

I am unable to concur in that view, and think that that case when fully considered does not support it.

The contention of those who support that view of the section is that it expressly provides a bar where one tenant in common has been in possession of an entirety or more than *his undivided share* of the land or of the profits thereof for his own benefit; but the fallacy of that contention is, I think, with submission, clear, when we consider the state of the law previous to its passing, and the principle under-lying all Statutes of Limitations regarding real property—viz., that they refer only to cases where the

Judgment. party entitled is out of possession, and some one is in  
BURTON, possession.  
J.A.

As the law stood previously, the possession of one tenant in common was the possession of the other person also entitled as tenant in common, and the section in question was passed to put an end to that state of things, and it has no application whatever to a case like the present where the plaintiff is either actually in possession, or recognized as in possession by the payment of a portion of the rents and profits. It applies only to those cases where the party entitled is out of possession, and as to him the possession or receipt of the entirety, or more than his undivided share of the rents and profits by his co-tenant ripens into a title and bars his right.

If the three children of the late Robert Baldwin had been, as the defendants contend, entitled as tenants in common to one moiety of this property, William Augustus Baldwin being entitled to the other moiety, and he had for over the statutory period, received the whole profits without accounting to any of them, his receipt would have barred them all; or if he had accounted to the plaintiff for his share, that would not have prevented his acquiring a title as against the others, for his possession was not their possession. But here in fact he did account to the plaintiff, acknowledging his right therefore as tenant in common, although he did not pay to him the full share to which he was entitled.

The case is in some respects not dissimilar to *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42, where two persons were entitled to an interest in one-fourth of some mines, but the interest of one in that fourth ceased on the death of a third person, and went over to the owner of another one-fourth, but she had an interest in another one-fourth in another right, and continued in receipt of the produce of her own and the other fourth, that is, of two-fourths, just as if her interest had not ceased and her co-tenant continued to receive the produce of his one-fourth only; this arose as here from mistake and not from arrangement or from fraud,



and it was held that this was not an adverse possession of the one-fourth share which had gone over unless it could be contended that every tenant in common receiving more than his share must be considered as in adverse possession of the surplus so received by him, which could not be maintained. Both parties had a right to receive, and did during all the time receive, a share in the rents and profits as tenants in common. So the case was held to fall expressly within the Statute of Anne, which gives in such cases an action of account against the co-tenant in common, who had received more than his share. In the present case William Augustus Baldwin made a mistake in accounting to the plaintiff only for one-sixth instead of a moiety, but he could not thereby acquire against him a title to any portion of the moiety to which the plaintiff was all the time entitled.

Judgment.

BURTON,  
J.A.

The Statute of Limitations can have no application to such a case. The statute applies only to cases where the true owner is out of possession and another in possession for the prescribed time. There must be both absence of possession by the person who has the right and actual possession by another to be protected to bring the case within the statute.

The case of *In re Hobbs, Hobbs v. Wade*. 36 Ch. D. 553, was a case of that kind—a person wrongfully in possession of the rents of an entire property to the rents of one moiety only of which he was entitled, the parties entitled to the other moiety being his two sons, Samuel and John. As to John, it was held that he being a minor, the father must be taken to have entered into the receipt of the rents as bailiff of his infant son, and that as to his share, therefore, the statute did not run. But as to Samuel, it was the ordinary case of the true owner being out of possession for over the statutory period, the father being wrongfully in possession, and there being no evidence that he had received the rents as agent for Samuel, or had acknowledged his title in writing, or accounted to him for the rents before the expiration of the statutory period.

Judgment.

BURTON,  
J.A.

I quite concede that if one of several tenants in common is in possession of the entire rents without acknowledgment or accounting to his co-tenants for over the statutory period that has the same effect as being in the exclusive possession and occupation for the same period. But no such question arises here. The point is presented in the same way as if the appellant, being in possession and entitled to the whole, had allowed two strangers, which for this purpose, in my view of the case, the late Robert Baldwin and Mrs. Ross were, to occupy with him.

If the plaintiff had allowed the others to collect the rents of certain portions of the property specified and set apart for them, I can well understand their acquiring a title to those portions of the property as fully as if they had been in the actual occupation; but how his allowing them to receive a certain portion of the entire rent can vest in them a title to an undivided two-thirds of the property, any more than his allowing them to occupy with him the land itself, is a proposition for which no authority has been cited, and which I am not, in the absence of authority binding on this Court, prepared to adopt.

Where two men are in possession, the law will adjudge it to him that hath the right: *Reading v. Rawsterne*, 2 Ld. Raym. 829.

But it is contended that the plaintiff's claim is barred by acquiescence and by the course of action pursued by all parties from the time of the Admiral's death up to 1886 when the plaintiff for the first time became aware that there was a doubt as to the proper construction of the will, commencing with a lease made on the 19th of June, 1866, to one Hammond, in which the widow of the deceased Admiral and all the parties then supposed to be entitled in remainder were parties.

That lease recited a former one from the testator to Hammond with a right of renewal, the death of the Admiral and his will whereby he devised the lands and premises comprised in the lease to the Hon. Robert Baldwin and William Augustus Baldwin, in the terms already

referred to, and that in the events which had happened the same had become vested in William Willcocks Baldwin, Robert Baldwin, Phoebe Maria Baldwin, and Augusta Elizabeth Ross, the heirs of the said Robert Baldwin, and was followed by a series of other documents containing similar recitals. Then a sale made in 1870, in which all these parties join in the deed and receive the purchase money, dividing it as well as the rents from time to time received equally, and another in 1871, culminating in a partition deed in 1885 of a large portion of the property.

It is admitted that all parties during these transactions acted in the most perfect good faith, all equally believing that they were entitled as tenants in common up to the time when in May, 1886, the plaintiff became aware of his rights.

Of course if this had gone on, the plaintiff knowing what his rights were, it would be a case of the clearest acquiescence, and he could not be heard to set up his present claim in a Court of Justice; but acquiescence imports and is founded on knowledge, and a recognition resulting from ignorance of a material fact goes for nothing, and will not be a bar to relief when the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed: *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223.

And although mistake in a matter of law cannot in general be admitted as a ground of relief in equity, this must be understood as denoting the general law and not to be applicable to cases where the words are used in the sense of denoting a private right. Ignorance of a matter of law, said Lord Chelmsford, in the case I have just referred to, arising from the doubtful condition of a grant, is very different from ignorance of a rule of law. Therefore where a certain construction has been put by a Court of law on a deed it must be taken that the legal construction was clear, yet the ignorance before the decision, of what was the true construction, cannot be pressed to the

Judgment.  
BURTON,  
J.A.

Judgment.  
BURTON,  
J.A.

extent of depriving a person of relief on the ground that he was bound himself to know beforehand how the grant must be construed.

Nor can it make any difference that these admissions were made in recitals in sealed instruments. The case of *Lansdowne v. Lansdowne*, 2 J. & W. 205, is a strong case to shew how far the Court will go to grant relief where parties have acted under a mistake as to their rights. This case is very different from one where agreements or deeds have been executed founded on a valuable consideration. Here the parties were getting something to which, in the view we take of the case, they were not entitled, and whatever may be their rights or liabilities in respect of moneys actually received whilst all parties were under a like mistake, it would be contrary to every principle of justice to hold the plaintiff concluded by any such admissions or by his expressed intention when he was first apprised of his rights.

The defence that what took place partook of the nature of a family arrangement was not I think pressed as if counsel had much faith in it, but for the reasons I have already suggested it is clear that there is no foundation for such an argument.

Cases of that kind are in the nature of a compromise, and there can be no room for a compromise where no question had arisen, but all parties were under the same common mistake, and the arrangements that were made were so made in supposed furtherance of what all parties believed to be the facts.

It remains to consider whether the plaintiff is entitled to recover back the moneys received by his brother and sister under these circumstances, and whatever may be the doubts as to the law in the United States, it appears to be clear upon the authorities that payments so made form a permanent exception to the right to relief for mistake in England and this Province.

The case of *Rogers v. Ingham*, 3 Ch. D. 351, was very similar in its circumstances, and the law there laid down governs this case.



Lord Justice James, after referring to the facts, said :  
“No authority whatever has been cited to us in support of the proposition that an action for money had and received would lie against a person who has received money from another, with perfect knowledge of all the facts common to both, merely because it was said that the claim to the money was not well founded in point of law ;” and he adds : “I have no doubt there are some cases which have been relied on in which this Court has not adhered strictly to the rule that a mistake in law is not always incapable of being remedied in this Court ; but relief has never been given in the case of a simple money demand by one person against another, there being between those two persons no fiduciary relation whatever, and no equity to supervene by reason of the conduct of either of the parties.”

Judgment.

BURTON,  
J.A.

I am of opinion, therefore, that the moneys so paid to and received by the defendants, or those whom they represent, cannot be recovered back.

The result, in my opinion, is, that the plaintiff is entitled to a declaration that he is entitled to the lands in the will mentioned as the heir-at-law of the late Robert Baldwin ; that the partition deed should be declared to have been executed by mistake and a re-conveyance directed ; that the plaintiff is entitled to the proceeds of the land sold and now in Court or deposited in a bank to abide the result of the suit ; and that the appeal therefore should be allowed, and judgment entered for the plaintiff in accordance with the foregoing declarations.

The disposition to be made of the costs has not been the least difficult of the questions in this case, bristling even as it does with intricacies and complications. Had the plaintiff discovered his mistake shortly after executing the partition deed, and nothing else had occurred, the Court on relieving him from his mistake would have probably granted that relief only on payment of the costs to which the other parties had been exposed, but here the mutual mistake was made long ago and submitted to for

Judgment.  
BURTON,  
J.A. many years, during which period moneys were paid over to the defendants, to which, under our decision, they were not entitled. These and many other considerations, which I need not further refer to, but among which are the near relationship of the litigants and the fact that all parties acted in perfect good faith, have led us to the conclusion that it is not a case for costs, but that justice will be best attained by leaving all parties to bear their own.

OSLER, J. A. :—

The first and one of the principal questions in this case is what interest did the plaintiff take under the will of the late Admiral Baldwin, which was made on the 14th of August, 1850, before the passing of the Act to abolish the law of primogeniture in Upper Canada.

By the 1st clause of the will, the testator devised the property in dispute to his wife for life. By the 8th clause he devised it after her death to his nephews, the Hon. Robert Baldwin and William A. Baldwin, in fee, "or in the case of the death of them, or of either of them in my own life time, then I devise the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns."

The testator died in 1866, and his widow in 1870. His nephew, Robert Baldwin, died in his life time in 1858, leaving the plaintiff, who was his eldest son, and Robert Baldwin, jr., Phœbe W. Baldwin, and Augusta Elizabeth Ross, his then children him surviving. Phœbe M. Baldwin died unmarried and intestate. The defendants are Mrs. Ross and the representatives of Robert Baldwin, jr., who is also dead.

The plaintiff's contention is that being the eldest son of Robert Baldwin, he takes as devisee under the will the share which his father, Robert Baldwin, would have taken if he had survived the testator to the exclusion of his brother and sisters; in other words, that he is the "heir-at-law" designated in the will.

The defendants on the other hand contend that Robert Baldwin having died after the Act to abolish primogeniture came into force they as well as the plaintiff are his heirs-at-law, and consequently take as joint devisees with him under the will.

Judgment.  
OSLER,  
J.A.

Under this devise the heir-at-law takes as purchaser claiming directly under the will and not through Robert Baldwin his ancestor. The term "heir-at-law" is employed simply as a designation of the person to whom the estate is to go after the widow's death in case of the death of Robert during the testator's lifetime.

"It being necessary to the constitution of a devise, that there be a devisee certain or capable of being made so; the law requires everyone claiming in that character to answer the description the deviser has given. Thus, if one claim under the description of heir, he must shew that he is heir in that sense in which the testator has used the term." 1 Powell on Devises, p. 309. And under such a devise as that in question it would seem, laying out of consideration for the moment the question of what effect should be attributed to the 14 & 15 Vic. ch. 6 (1851), which was passed after the date of the will, that the common law heir would be intended, the canon of descent laid down by the 4 Wm. IV. ch. 1, sec. 1, being inapplicable.

"If a lease for life (of lands of the nature of gavelkind) be made, the remainder to the right heirs of B., and B. dieth, his eldest son only shall inherit, for he only to take by purchase is right heir by the common law:" Co. Lit. 10a, cited in Elphinstone, Norton and Clark on the Interpretation of Deeds, p. 253. And the same in the case of a devise: *Garland v. Beverley*, 9 Ch. D. 213, and other cases cited by the authors, p. 254.

The character of the person who was to take as devisee in the event of the death of Robert Baldwin in the testator's life time was thus ascertained by the will, and, unless a difference was made by the statute of 1851, which came into force on the 1st of January, 1852, was the same at the time of the making of the will and the time at which it came into operation.

Judgment.

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OSLER,  
J.A.

If Robert Baldwin had died between the 14th of August, 1851, and the 1st of January, 1852, the plaintiff would have been his heir-at-law, and if the Admiral had died after Robert and before the 1st of January, 1852, he would without question have taken as answering that description. Why then is the will, which operates from the time of its execution, to receive a different construction now from that which it would have received had it come into operation before the 1st of January, 1852?

The case of the defendants on this point rests wholly on the fact that between these dates the law of descent had been altered by the Act referred to, so that the heir mentioned in the will, instead of being the heir at common law, or perhaps under the statute of William IV., would be, as they contend, those persons upon whom his property would devolve, in case of his intestacy, under the provisions of that Act, being, in the present instance, all the sons and daughters of Robert Baldwin; in other words, that the will must be read as referring to those who, in consequence of any change in the law, should retain the character of his heir-at-law, or heirs-at-law, at the time of the testator's death.

It is also argued that as the testator lived long after this change in the law, and yet made no alteration in his will, he must be presumed to have known of the change and to have intended to allow his will to take effect in accordance with it.

I am unable to assent to either of these propositions.

There is no doubt that since the Act of 1851 came into operation all a man's children, instead of his eldest son alone, become in the event of his death intestate his heirs-at-law, but it by no means follows that in the case of a will made before that Act such a change in the law has the effect of altering the meaning of the testator's language so as to pass the estate to persons to whom, as the law stood when he employed it, he never intended to devise it. There is nothing in the Act from which it can be inferred that it was the intention of the Legislature to



affect the construction of wills, and *a fortiori* of wills which then had been made, but the contrary; and at the time this will was made, and when it came into operation, the old law prevailed that in relation to a devise of real estate a will spoke from the time of its execution.

Judgment.  
OSLER,  
J.A.

It was said that the devise in question was like a gift to a class or fluctuating body of persons such as children or descendants which usually applies to the persons answering the description at the death of the testator; but I think there is no analogy: the testator has indicated the devisee by a technical expression, and we have to look for some one who answers its meaning as it was then used by him.

In *Jones v. Ogle*, L. R. 8 Ch. 192, Lord Selborne, speaking of the effect of the Apportionment Act, 1870, upon a will previously made says: "If it were necessary to decide, I should have very great difficulty in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act passed. \* \* I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made."

And in *In re March, Mander v. Harris*, 27 Ch. D. 166, Lindley, L. J., says, speaking of the effect of the Married Woman's Property Act upon a will executed prior to the Act by which property was given to a husband and wife, and a third person: "What then did she acquire under the will? That depends upon the proper construction of the will, and for purposes of construction those rules which prevailed when the will was made and with reference to which wills may be fairly presumed to have been framed must be observed. The reasoning of the Lord Chancellor in *Jones v. Ogle*, L. R. 8 Ch. 192, upon this point appears to us unanswerable."

Much reliance was placed by the defendants upon the observations of Jessel, M. R., in *Hasluck v. Pedley*, L. R. 19

Judgment.

OSLER,  
J.A.

Eq. 271, that a testator who knows of an alteration in the law and does not choose to alter his will must be taken to mean that his will shall take effect according to the new law. I venture to think that the effect of that observation has been misapprehended, and that the learned Judge never meant to lay down any general rule opposed to what is said by the Lord Chancellor, and the Lords Justices, in the cases above cited. He was dealing with the case as if the Act applied (as he thought it did, and as in *Lawrence v. Lawrence*, 26 Ch. D. 795, it has been held to do) to wills made before it was passed, and that being so he says that if the testator, who must be presumed to have known of the change in the law and the effect it would have upon his will, did not choose to alter his will by expressly stipulating (as the Act permitted him to do) that no apportionment should take place, he must be taken to mean that it should take effect according to the new law. We cannot, in my opinion, adopt the defendants' contention on this point without giving a meaning to the term "heir-at-law" different from that which it had when the testator used it, and in which he employed it, and thereby altering the construction and legal operation and effect of his will. I refer on this point to two well considered cases in the Supreme Court of North Carolina and the Supreme Court of the United States: *Battle v. Speight*, 9 Ired. 288; *Carroll v. Carroll*, 16 How. 275.

A question similar to that now under consideration arose in the case of *Quick v. Quick*, 21 N. J. Eq. 13. There the testator, Jacob Quick, made his will in 1808, at which time, by a law of 1780, the estate of an intestate descended in the proportion of two shares to a male to one share to a female. By his will he devised a farm to his son Ezekiel for life, and to his widow, in case he should leave one, during her widowhood; "and at the decease of his widow, the said devised tract of land is to go to his heirs to be divided among them *as the law directs* in case of dying intestate."

Jacob Quick died in November, 1816, but between that

date and the making of his will, the law of descent had been changed so that in case of intestacy males and females inherited equally.

Judgment.

OSLER,  
J.A.

Ezekiel Quick did not die until 1867, and in determining the rights of those who succeeded under Jacob's will it was held that the law as it was at the date of the will prevailed, and not the law as it was at the death of the tenant for life. The will, it was said, spoke from the date of its execution, and the word heirs must receive what was its legal meaning in the year 1808.

Another ground on which I think we are obliged to give the will under which the plaintiff claims the construction I have indicated is that such a devise appears to be expressly excluded from the operation of the Act of 1851. That I think was the ground, or one of the grounds, on which *Tylce v. Deal*, 19 Gr. 601, was decided, though there the devise in question was to the right heirs of the testator himself; and as he therefore did not die intestate, there would appear to have been even less room than there is here for the contention that the heirs were those designated by the Act.

After having enacted what shall be the the law of descent, in other words, who shall be the heirs of a person dying intestate, after the 1st of January, 1852, in case of estates held in fee simple or *pur autre vie*, the 16th section enacts *inter alia* that none of the provisions of the Act shall affect any limitation of any estate by deed or will. I cannot regard this as intended simply to save the case of an estate tail, for by the terms of the preamble and the first enacting clause the Act is expressly confined to estates in fee simple, and *pur autre vie*, and for the same reason it cannot refer to any other limitation under which the estate may have been conferred upon the intestate. If he held it in fee simple or *pur autre vie* the Act applies, otherwise not. But in terms the section excludes from its operation any limitation of any estate by deed or will, and that would embrace not only a disposition by the owner, but also just such a case as we have before us, where the

Judgment.

OSLER,  
J.A.

estate has been limited by will to the heir-at-law of a stranger and consequently the prescribed rule of descent is not to apply, nor the statutory heirs to take. See also *In re Whitaker, Christian v. Whitaker*, 34 Ch. D. 227, at p. 233. It was argued that the section merely applies to the limitation of an estate, whereas the words "heirs-at-law" here are words of purchase. That no doubt is so, but they are also to be construed in a double sense, "for they not only designate the person to whom the estate is to go, but also contain a limitation to them in fee:" *Doe dem. Sams v. Garlick*, 14 M. & W. 698, at p. 710; 2 Jarman on Wills, 4th ed., pp. 61, 62.

The Act 43 Vic. (O.) ch. 14 (1880), may be noted as a recognition by the Legislature of the construction which had been placed upon the word "heirs" by the case of *Tylee v. Deal*, 19 Gr. 601.

It thus becomes necessary to examine the other defences which have been set up to the action, and to consider the effect

(1.) Of the receipt by the defendants of certain shares of the plaintiff's moiety of the rents of the land since 1870; and

(2.) Of the several deeds and other instruments, and in particular of the partition deed of 1885, executed by the plaintiff and his brother and sister, in which he has admitted the position they now assert as tenants in common with him under Admiral Baldwin's will.

The partition deed is also relied upon as being, when taken in connection with the other facts, in the nature of a family arrangement, and as affording a defence on that ground; and there is the claim to recover back moneys which have been already received by the defendants on sales of part of the devised property, and otherwise, under the erroneous belief that they were interested therein in common with the plaintiff, but the consideration of these matters may conveniently be deferred for the present.

And first with regard to the Statute of Limitations, which the defendants rely upon as having run in their



favour in consequence of their receipt of a share or part of the rents of the property for over the statutory period.

The standpoint from which this defence must, of course, be looked at is that on the termination of Mrs. Baldwin's life estate in 1870, the plaintiff was entitled as tenant in common with W. A. Baldwin to the whole of the property to the exclusion of the defendants.

The following admissions made for the purpose of the action make it needless to refer at length to the dealings of the parties with the property, but it may be stated for the sake of clearness that neither W. A. Baldwin nor the plaintiff or defendants were in personal occupation of it. It was rented, and the rents of the whole or of so much of it as was from time to time under rent were, with the assent of the others, received by W. A. Baldwin who retained one-half thereof for himself and paid over the remainder in equal shares to the plaintiff and Robert Baldwin, or his trustees, and to Mrs. Ross. The admissions are :

[The learned Judge read the admissions, and continued:]

The persons in possession were therefore W. A. Baldwin, and the plaintiff, and his brother and sister.

The key note, if I may call it so, of the Statute of Limitations is the protection of an actual and exclusive possession, or receipt of rents and profits, which has continued for the prescribed period, as against the real owner, whether solely interested, or as tenant in common, who has been out of such possession or receipt during that time.

In *Smith v. Lloyd*, 9 Exch. 562, Parke, B., giving the judgment of the Court said: "We are clearly of opinion that the statute applies not to cases of want of actual possession by the plaintiff, but to cases where he has been out of, and another in possession for the prescribed time. There must be both absence of possession by the person who has the right, and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute. We entirely concur in the judgment of Blackburne, C.J., in *McDonnell v. McKinty*, 10 Ir. L. R. 514, and the principle upon which it is founded."

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

This view has been expressly approved, and I think adopted as one ground of their decision, by the Judicial Committee of the Privy Council in the recent case of *Agency Co. v. Short*, 13 App. Cas. 793, where the question arose upon a Colonial Statute similar in terms to the English Act and our own.

See also Sugden's Property Statutes, 2nd ed., p. 33; Smith's Leading Cases, 7th ed., vol. 2, p. 692.

The case before us is in principle really the same as that which would have arisen if, instead of having been allowed to receive a share of the rents, the defendants had been in the actual occupation of the property together with W. A. Baldwin and the plaintiff, during the whole period, and if the principle of the statute be what I have stated it to be, a tenancy in common between a stranger and the true owner, who is also in possession, cannot arise. For this, authority seems not wanting. The plaintiff has not been *dispossessed*, and he certainly cannot be said to have *discontinued possession*, the difference between the two, as expressed by Fry, J., in *Rains v. Buxton*, 14 Ch. D. 537, being that "the one is where a person comes in and drives out the others from possession, the other is where the person in possession goes out and is followed into possession by other persons." Both modes of thus obtaining a wrongful possession may still properly be called disseisin: Williams on Seisin, p. 5, cited in *Leach v. Jay*, 9 Ch. D. 42, at p. 44. But the plaintiff, having all along been in possession, has never been dispossessed or disseised; and in *Reading v. Rawsterne*, 2 Ld. Raym. 829; 2 Salk. 423, it is laid down that "where two men are in possession of land, the law adjudges it to" (or, *with*, as one report has it) "him that hath the right until he be actually disseised. B. and D. were not tenants," (*i. e.*, tenants in common, as the report shews) "for B. was a mere stranger, and though he took a moiety of the profits that will not make him tenant in common, for a man cannot disseise another of an undivided moiety, as he may of such a number of acres."

It was argued that this case was a mere illustration of

the former doctrine that adverse possession as distinguished from non-adverse possession was necessary in order to set the Statute running, or else that it turned upon a technical and limited meaning being attached to the word "disseised." But in the passage quoted the word seems to mean nothing more than "dispossession," and to have been employed in its general sense as comprehending any particular mode of interfering with the seisin: *Taylor d. Atkins v. Horde*, 2 Sm. L. C. 7th ed., pp. 662, 663, *note*. Adverse possession was no doubt always necessary to be proved, but where the real owner is in possession it is as true now as it was in former days to say that no one else can, in the nature of things, also be in possession for the purpose of acquiring a title.

Judgment.

OSLER,  
J.A.

In *Orr v. Orr*, 31 U. C. R. 13, Richards, C. J., refers to *Reading v. Rawsterne*, 2 Ld. Raym. 829, as applicable under our Limitation Act, and says that the views expressed in *Stephen v. Simpson*, 12 Gr. 493, and in Appeal, 15 Gr. 594, seem to accord with the doctrine laid down in that case. See also *Canada Permanent Loan and Savings Co. v. McKay*, 32 C. P. 51; Crabb's Law of Real Property, vol. 2, p. 951. And in Burton's Compendium of the Law of Real Property, 8th ed. (1856), sec. 396, p. 139, it is said: "So much is clear, that no person can be disseised of an undivided part of his estate: if he be solely entitled to the land, the disseisin (to whatever measure of territory it may extend or be confined,) must be absolute and exclusive."

The only semblance of authority which the respondents have been able to cite in their favour on this point, (for they declined to rely upon the case of *In re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553, on which the learned Judge below rested his decision), is the dictum, or *quære*, as the reporter calls it, of Lord Chelmsford, when sitting with Turner L. J., in the case of *Williams v. Williams*, L. R. 2 Ch. 294, where a division of property between two brothers, one of whom was the heir-at-law, was upheld as a family arrangement. Lord Chelmsford said that it had

Judgment.

OSLER,  
J.A.

occurred to him, though the point had not been mentioned on the argument, that the plaintiff's right to a moiety of the freehold estate might be maintained under the Statute of Limitations, as he had since the death of the father (a period of upwards of twenty years) been permitted to enjoy it in common with his brother the heir-at-law. Lord Justice Turner takes no notice of the point, and it is difficult to suppose that it could have escaped the attention of Sir Roundell Palmer and the other counsel for the plaintiff. While, therefore, the observation, as coming from a Lord Chancellor, is entitled to respectful consideration, it cannot under the circumstances be accepted as a binding authority.

*Ward v. Ward*, L. R. 6 Ch. 789, only decides that where two persons having been in lawful possession of land, their title came to an end, and they nevertheless continued in possession, they were in as joint tenants, and upon the death of one his interest ceased, the other taking the whole by survivorship. *S. P.*: *Bolling v. Hobday*, 31 W. R. 9. Note also Co. Litt. sec 310, 195 *a. b.* as to tenancy in common arising by prescription, and the observations of Mr. Joshua Williams upon that section in his book on Seisin.

The case of *Williams v. Pott*, L. R. 12 Eq. 149, was also cited, where a person, though actually in possession of his own land, was held to have lost it by accounting for, and paying over the rents and profits to, another for more than twenty years. That, however, was a case of principal and agent. The agent made no claim to any part of the land, or of the rents and profits, but received them for and paid them over to his principal. His possession was therefore held to be the possession of his principal, and not a possession which he could treat as his own.

The defendants, however, rely, as does also the learned Judge below, upon the 11th section of the Act, R. S. O. (1877), ch. 108. From what I have already said, it will be seen that I am unable to agree that this section has any application to this case.



Its object manifestly was, and is, merely to alter the law which formerly prevailed (*Culley v. Taylerson*, 11 A. & E. 1008) by which the possession of one tenant in common, was the possession of the others. But it bars no right and confers no title : *Bolling v. Hobday*, 31 W. R. 9 ; *Hayes on Conveyancing*, vol. 1, p. 267. It simply declares, and its language should be noted, that the possession of one or more of several tenants in common of the entirety or of more than his or their undivided share or shares of the land or of the profits thereof (as to the meaning of the word "profits" see *Sugden's Property Statutes*, pp. 45, 46, 47), shall not be deemed the possession of the other tenant or tenants in common. The effect to be attributed to his possession is to be found in other sections of the Act, and if it is to be that of barring his co-tenants, it must have been as strong and exclusive as is required in the case of a sole owner. For the proper construction and meaning of the section, I refer to *Darby on the Statute of Limitations*, pp. 286, 287 ; *Sugden's Property Statutes*, pp. 65, 66, 67, and to *Murphy v. Murphy*, 15 Ir. C. L. R. 205, where it was very much considered.

The Court say : "The words 'more than his undivided share' apply only to the case in which the party is in possession of an undivided share greater than what he is really entitled to : as, for example, if there be originally and in fact three joint tenants, and one of the three cease to be possessor, and the farm is held jointly by the other two, in this case neither of the other two is in possession of the entirety of anything ; but each is in possession within the Act, of more than his undivided share." In this connection I may also note from *Burton's Compendium*, 8th. ed., section 397 : "So if a person be entitled to an undivided moiety or third part, he cannot be divested of any fraction of that share, though he may be disseised of his whole moiety or whole third part."

If William Augustus Baldwin had received and retained for the statutory period the whole of the rents, he would, I

Judgment.

OSLER,  
J.A.

## Judgment.

OSLER,  
J.A.

presume, have acquired a title to the whole property as having been constructively in possession of the whole. Or if he had been in possession or in receipt of the profits of a defined and separate part of it he would have acquired that part. Or again, if the plaintiff and defendants had in fact been tenants in common with him, and he and the defendants had been in possession, or in receipt of the profits or of the whole of the rents, to the exclusion of the plaintiff, they would have been in possession of more than their undivided shares within the meaning of the section. And so too if the defendants had been in actual possession or in receipt of the profits of some defined part of the land, they would have been in the way to acquire a title to that part as against everyone else. But the section can, it appears to me, have no application to a case like the present where the two tenants in common, W. A. Baldwin and the plaintiff, were constructively in possession, the former recognizing the latter's title as such by paying him a part, though not so much as he was entitled to, of the rent received from the tenants in possession. If W. A. Baldwin instead of paying to the defendants the residue of the plaintiff's share of the rent, under the mistaken view which prevailed of the rights of the parties, had retained it or applied it to his own use he would not have been in possession or in receipt of the profits of any undivided share as against the plaintiff, within the meaning of the section, so as to have acquired any part or share of the latter's moiety, and the case of *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42, cited by Mr. Robinson, shews, I think, what, in such a state of things, the plaintiff's remedy would have been. And if W. A. Baldwin could not under such circumstances have acquired a title, his possession not having been an exclusive possession, the defendants, who are strangers, can be in no better position simply because they have, by mistake, been paid a part of the rent which ought to have been paid to the plaintiff.

The principal defences to the action having been thus disposed of, it remains to consider whether the plaintiff

has made out a case which entitles him to be relieved from the partition deed of January 1885, and to repayment of the moneys which he has allowed the defendants to receive in the course of their joint dealings with the property.

Judgment.

OSLER,  
J.A.

There is great difficulty in acceding to the defendants' contention, which was not, indeed, very confidently urged, that these dealings, terminating with the partition deed in question, should be regarded as something in the nature of a family arrangement for a joint division of the estate, which ought to be upheld on the principle on which the Court refuses to disturb such arrangements. The question of the repayment of the money already received by the defendants stands on a footing peculiar to itself, but I entirely agree with my brother ROBERTSON that the case falls short of what is necessary to establish a family arrangement. There is an entire absence of what was so prominent in the case of *Williams v. Williams*, L. R. 2 Ch. 294, viz., a deliberate, in the sense of intentional, abandonment of a right, nor was there here as there was in that case a consideration in fact for what was given up. It is impossible to say that there was anything in the nature of a compromise of disputed rights or the existence of a motive influencing the plaintiff to surrender rights which he supposed or believed that he might possess. The acts relied upon, up to the date of the partition deed, as evidencing an arrangement, were simply done in ignorance of his rights, and can, in my opinion, have no operation beyond the particular property which was dealt with.

Then as to the partition deed. If the view which I have taken of the plaintiff's position in other respects be sound, he was by that deed, wittingly or unwittingly, making a present to the defendants of his own property. If he was cognizant of his rights he is of course estopped by the deed from now asserting them, but his case is, and the evidence really leaves no room for disputing the fact, that he was ignorant of them until the month of May, 1886. Nor is there any reason to suppose that in the course of

Judgment.

OSLER,  
J.A.

the various dealings which have taken place with respect to the property since 1870 the attention of the plaintiff's advisers was ever directed to the question which has at last arisen. It has simply been taken for granted all along that the parties acquired equal interests under Admiral Baldwin's will. There has been no acquiescence, that I can see, on the plaintiff's part, which can estop him from asserting his right as against this deed (or the deed of May, 1878, so far as any lands partitioned under it remain undisposed of) for, as Lord Chelmsford said in *Beauchamp v. Winn*, L. R. 6 H. L. 223, at p. 235: "Acquiescence to operate as an equitable estoppel must be with knowledge that the party acquiescing has a right which would be available against that which he has permitted to be enjoyed." The plaintiff, in executing those deeds, in so far as the property thereby allotted to the defendants is concerned, was under a mistake, and in ignorance of his rights, and in my opinion the case as regards his right to be relieved from them comes fully within the propositions laid down in the cases of *Cooper v. Phibbs*, L. R. 2 H. L. 149, at p. 170, and *Earl Beauchamp v. Winn*, L. R. 6 H. L. 223, at p. 234. These cases, however, cannot be invoked by the plaintiff in support of his in some respects analogous claim to recover from the defendants the moneys which he has paid or suffered to be paid to or received by them as their supposed share of the rents, or of the purchase money of the lands which have been actually sold. There is a settled distinction between the right to be relieved from the effect of a deed executed under such a mistake as has here been shewn to exist, and the right to recover back money which has been actually paid under a similar mistake. I think that appears very clearly from the case of *Rogers v. Ingham*, 3 Ch. D. 351, which the plaintiff fails to distinguish, and which is a clear authority against him.

For these reasons I am of opinion that the appeal should, to the extent I have indicated, be allowed, and the plaintiff declared entitled to the moneys in Court, the proceeds of the lands allotted to the defendants under the partition deed of January, 1885.



Under all the circumstances I think that all parties should bear their own costs of the action and of the appeal. As to the appeal, each party succeeds in part. As to the action, the same. And the plaintiff was seeking to get rid of his own deed and it was not unreasonable on the part of the defendants to contest the action, looking at the course pursued by all parties for a long series of years.

Judgment.

OSLER,  
J.A.

FERGUSON, J. :—

The plaintiff contends that in the events that have happened he is, under the provisions of the last will of the late Hon. A. W. Baldwin, entitled to the whole of one-half of the property mentioned in the said will, and therein said to be the property known as "Russell Hill," or rather to the whole of the proceeds of one-half of this property.

The defendants contend the contrary of this, and say that they are entitled to share in this property or the proceeds thereof, and that the plaintiff is entitled to only one-third part of the same.

The late Robert Baldwin, whose estate is represented here by the defendants, the executors, Kingstone and Macdonald, was a brother of the plaintiff. The defendant Augusta Elizabeth Ross is a sister of the plaintiff, and all three were living at the time of the decease of their father the late Hon. Robert Baldwin, the plaintiff being the eldest of the three, and the eldest son of the Hon. Robert Baldwin. No question is raised as to any rights of any other members of the family, or of any descendants of any such member.

The first question to be considered, as it appears to me, is as to the true meaning and construction of the will of the Hon. A. W. Baldwin, so far as it has regard to the disposition of this property, for if the true meaning of the will in this respect is against that contended for by the plaintiff and in favour of what the defendants contend for, a decision to this effect would, as it appears to me, determine the differences existing between the contend-

Judgment. ing parties. If, on the other hand, the true meaning and  
FERGUSON, J. construction of the will is as contended for by the plaintiff  
and so decided to be, there yet remain many other matters  
that will require consideration before the rights of the  
parties can be determined.

The will was made on the 14th day of August, 1850, and before the coming into force of the Act commonly spoken of as the Act abolishing primogeniture; which Act was passed on the 2nd day of August, 1851, but by its provisions did not come into operation till the 1st day of January, 1852.

The testator died on the 5th day of January, 1866, leaving him surviving his widow Augusta Melissa Baldwin, who died on the 19th day of April, 1870.

So far as I am able to see, there are only two clauses of this will that it is necessary to consider for the purpose of determining the question as directly affecting it.

These are clauses or paragraphs numbered three and eight.

[The learned Judge read these clauses and continued:]

One of these nephews of the testator (William Augustus Baldwin) survived the testator many years. The other of them (the late Hon. Robert Baldwin) died on the 9th day of December, 1858, many years before the death of the testator.

Under the devise contained in the eighth clause William Augustus Baldwin took the undivided one-half of the remainder in the land expectant upon the death of the widow. No question is raised here as to this.

The late Hon. Robert Baldwin having pre-deceased the testator the question is raised as to who, upon the death of the testator, became entitled to the other undivided half of this remainder; or rather, the tenant for life having died, who, upon her death, was entitled to this undivided half of the land.

The plaintiff contends that he being the oldest son and heir-at-law, that is the common law heir, of the late Hon. Robert Baldwin, is so entitled.

The defendants contend that by reason of the passing of Judgment, the Act above referred to abolishing, so far as it does so, FERGUSON, J. the law of primogeniture, the words in the eighth clause of the will "*the heir-at-law or heirs-at-law of such deceased*" do not mean, or cannot in the events that have happened be taken to mean, the common law heirs of the late Hon. Robert Baldwin, but must be taken to mean those who under the provisions of the Act before referred to, which came into force on the first day of January, 1852, would inherit or take real estate of the late Hon. Robert Baldwin in respect of which he should die intestate, and that the late Robert Baldwin, the defendant Augusta Elizabeth Ross, together with the plaintiff, are those who became so entitled.

The preamble of the Act says that it is expedient to abolish the right of primogeniture in the succession to real estate held in fee simple or for the life of another in Upper Canada \* \* \* and to provide for the division of such real estate amongst the relatives of the person last seised as aforesaid and who shall have died without leaving any testamentary disposition thereof, as may best accord with the relative claims of such parties in the division thereof.

The first enacting clause provides: "That whenever on or after the first day of January, which will be in the year of our Lord one thousand eight hundred and fifty two, any person shall die seised in fee simple or for the life of another in any real estate in Upper Canada without having lawfully devised the same such real estate shall descend or pass by way of succession in manner following, that is to say." Then follow the provisions regarding the division to take place.

A rule, as I understand, is that in cases where the enacting part of a statute is plain and unambiguous one is not to look at the preamble. In the present case whether one looks at the enacting part, or the preamble, or at both, the Act seems plainly to be confined in its operation to cases in which a person shall die seised in fee simple or for the life of another of real estate without having law-

Judgment. fully devised the same, which is not the fact in the present case, for there was a lawful devise of this land, the devise now in question. It is to be borne in mind that the late Hon. Robert Baldwin was never seised of the land at all.

FERGUSON, J.

The Act provides for the division of the property in particular kinds of cases, well defined by its provisions, and the present case is not one of them, and I think this appears plainly to be so even without looking at what may be called the negative provision of section 13, as to which there was much contention at the bar.

It was, however, contended that owing to the provisions of this Act the words "heir-at-law or heirs-at-law" in the eighth clause of the will cannot in the events that have taken place be construed as referring to or meaning the person who would have been the heir-at-law of the late Hon. Robert Baldwin if the Act, or such an Act, had not been passed, and that in order to determine who in the circumstances is really meant by those words you must answer the question, who would have inherited or taken real estate in this country of which the late Hon. Robert Baldwin should have died seised and intestate.

After what I think may be called a careful consideration of the arguments, and a faithful perusal of the authorities referred to in support of them, I am unable to take this view, though I am willing to say that during the argument of counsel I was impressed with it.

The case *Jones v. Ogle*, L. R. 8 Ch. 192, was in regard to the effect of the Apportionment Act of 1870 upon the provisions of a will made before the Act came into force. In delivering judgment the Lord Chancellor said: "If it were necessary to decide, I should have great difficulty indeed in seeing my way to the conclusion that this Act of Parliament either was intended to alter, or has in this case had the effect of altering, the proper construction of words contained in a will made before the Act passed. If a will had been made afterwards, I can quite follow the argument which would say that in such a case the testator makes his will, having the Act of Parliament in



view, and that the words he uses are not to be construed without regard to the Act of Parliament. But I apprehend the construction of the words of a specific gift will be taken generally according to the meaning of the words at the period the will was made." &c. Judgment.  
FERGUSON, J.

The case, *In re March, Mander v. Harris*, in the Court of Appeal, 27 Ch. D. 166, was in regard to the effect of the Married Woman's Property Act of 1882 upon the provisions of a will previously made. Lord Justice Lindley in giving judgment says: "What then did she acquire under the will? That depends upon the proper construction of the will, and for purposes of construction those rules which prevailed when the will was made and with reference to which wills may be fairly presumed to have been framed, must be observed. The reasoning of the Lord Chancellor in *Jones v. Ogle*, L. R. 8 Ch. 192, upon this point appears to us unanswerable, and we do not regard the case of *Hasluck v. Pedley*, L. R. 19 Eq. 271, as really inconsistent with this view. In that very case the Master of the Rolls (Sir George Jessel) said: 'The Act does not affect the meaning of the will; it only alters its legal operation.' The construction is not altered, though the legal effect may be different, as was pointed out by Lord Justice Fry in *Constable v. Constable*, 11 Ch. D. 681." In that case (*In re March*) the Court was unable, as it appears, to distinguish the construction of the will from its legal effect.

The subject is one upon which much has been written and on which one might readily write more, but I think not profitably. My conclusion drawn from the authorities (whether accurately or not) in the light of what I think were very able arguments is in accordance with these cases that I have selected, and I am of the opinion that in giving to or placing upon the words in question a construction or meaning the law and the rules that prevailed at the time of the making of the will must be observed, and if this is the correct view there can, I think, be no doubt that the plaintiff, the common law heir of the late

Judgment. Hon. Robert Baldwin, is the person meant by the words  
FERGUSON, J. and the one who in the circumstances took by the devise.  
The case *Quick v. Quick*, 21 N. J. Eq. 13, to which I was  
referred by Mr. Justice OSLER, seems much in point.

The defendants, however, further contend, that even if  
such is the proper construction of the will in this respect,  
yet the plaintiff has by operation of the Statute of Limita-  
tions lost his right so taken to the extent of two undivided  
thirds thereof, and that they have become entitled to those  
two-thirds, the defendant Augusta Elizabeth Ross to one  
such third and the defendants, the executors of the late  
Robert Baldwin, as such executors to the other third.

Amongst the admissions made for the purpose of the trial  
of the action are the following :

[The learned Judge read the second and third admissions  
and continued :]

The chief material facts, however, presented in the  
argument upon which this contention of the defendants is  
based shortly stated seem to be these :

Immediately or soon after the death of the widow of  
the testator in the year 1870, William Augustus Baldwin,  
who in any view of the case was the owner of the undivi-  
ded one-half, and who was executor of the will of the  
Hon. Robert Baldwin, went into possession, or rather com-  
menced to receive the rents of the whole of the property,  
keeping and retaining one-half thereof as his own part  
or share and dividing the other half of such rents into  
three equal parts and paying one of such parts to the  
plaintiff, one to the late Robert Baldwin, and one to the  
defendant Augusta Elizabeth Ross. This was continued  
substantially from that period till the commencement of  
the present differences or the happening of the events out  
of which such differences arose, a period having in the  
meantime elapsed sufficient, as was conceded, to permit the  
full operation of the statute, if the case were such a one as  
to fall under its operation.

There had also been sales made of portions of the land  
and the purchase moneys divided in the same way as were

or had been the rents. Further details of the facts need Judgment. not, I think, be given here as the proposition was argued, FERGUSON, J. and as I think the decision in regard to it must rest, upon a case not different from the one above stated respecting the division and payment of the rents. At all events counsel in their arguments, which were of the most searching character, placed their contentions respecting this branch of the case upon that foundation of fact or one not differing from it.

How then does or did the statute apply or operate so as to defeat or defeat in part the plaintiff in what he now contends for? All the arguments based upon the hypothesis or supposition of a tenancy in common, or any co-tenancy, between or amongst the plaintiff and the defendants respecting this undivided one-half, must, I think, fall to the ground, for, according to the construction given to the will there was no such co-tenancy, and the defendants were mere strangers to the title.

The law was that the taking of a proportionate part of the rents and profits for the statutory period by a stranger to the title would not make him a tenant in common with the owner, the reason being that a man could not disseise another of an undivided part, as he could of such a number of acres of land, and that where two men are in possession of land the law adjudges it to be the possession of him who hath the right until he be actually disseised. See *Reading v. Rawsterne*, 2 Ld. Raym. 829; S. C. 2 Salk. 423.

If the point had to be decided upon the law as the law bearing upon the subject once stood, I should be clearly of the opinion that nothing had been gained against the plaintiff's title to the undivided half by the operation of the statute, because he was never disseised, and was always in the eye of the law in possession, of the one-half so that the statute could not run against him. Other reasons might perhaps be given, but this one would in such case be, I think, sufficient.

An important change in the law seems to have been

Judgment. made by the enactment which is now section 11 of ch. 111, R. S. O. (1887) which is the same as section 11 of ch. 108, R. S. O. (1877.) The same section is found in the C. S. U. C., 1859, and is the same as section 12 of the Imp. Act, 3 & 4 Wm. IV. ch. 27. The section is in these words:—

FERGUSON, J.

“Where any one or more of several persons entitled to any land or rent as coparceners, joint tenants or tenants in common have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last mentioned person or persons, or any of them.”

The provisions of this section have been the subject of discussion in a number of cases. In *Culley v. Taylerson*, 11 A. & E. at p. 1017, it is said that one effect of the Act is to make the possession of co-tenants separate things, so that the possession of one is not the possession of the other or others. In the case of *Murphy v. Murphy*, 15 Ir. C. L. R. 205, in which a former case *Tidball v. James*, 29 L. J. Exch. 91, is referred to, Chief Justice Monahan seems to have put a construction upon the words “more than his undivided share.” That learned Judge said they “apply only to the case in which the party is in possession of an undivided share greater than what he is entitled to: as, for example, if there be originally and in fact three joint tenants and one of the three cease to be possessor, and the farm is held jointly by the other two, in this case neither of the other two is in possession of the entirety of anything; but each is in possession, within the Act, of more than his undivided share.” See also the case *Denys v. Shuckburgh*, 4 Y. & C. Exch. 42.

I am unable to perceive how the defendants' case can be said to fall within or under the provisions of this section of the Act. The arguments in favour of the contention in



this respect were certainly very ingenious and searching, <sup>Judgment.</sup> but the fact had to remain that the plaintiff had always <sup>FERGUSON, J.</sup> received a share of the rents, and the admission is made that he, with the others, was continually in possession during the period relied on for the running of the statute. Counsel for the plaintiff steadfastly urged, amongst many other contentions, this possession of the plaintiff, saying that no case could be found, no authority referred to, shewing that one who had always been in possession had lost his rights, or any part of them, by the operation of the Statute of Limitations, and in this I am of the opinion that he was right.

On the part of the defendants it was also contended that the plaintiff by reason of his acquiescence in the division of the rents and the payment of a part thereof to the defendants as before stated, and by his execution of several deeds, one being a deed of partition, (the particulars of such deeds, I think I need not here enter into or discuss) containing recitals stating the ownership of the land to have been different from what he at present contends for, and by his dealings (so far as he did deal) with the lands in a way that was in accord with the contentions of the defendants, and against or inconsistent with his present contention, for so many years, is estopped from setting up his present contention.

In answer to this the plaintiff says that during the whole period referred to he was under a mistake as to what his rights really were, and that by reason of such mistake he is entitled to relief notwithstanding what is stated or referred to by the defendants in this contention. It is clear, I think, from the evidence that it is true that the plaintiff was under a mistake as he says. This was not as a fact disputed, and the defendants and the late Robert Baldwin seem to have been under the same mistake. I think it also appears that what was done under that mistake was not a pecuniary disadvantage to the defendants, for assuming the construction adopted above to be the true construction of the will, they the defendants

Judgment. were simply paid moneys to which they were not entitled.  
FERGUSON, J. At all events this is the main thing that was done.

The defendants say that the mistake was a mistake of law, and that the plaintiff was bound to know the law, and that he cannot, therefore, be relieved from what would otherwise be the effect of his acts and conduct and of his deeds.

The mistake was as to the construction and meaning of the will, that is the part of the will before alluded to; and, after all that has occurred, I think it will not be asserted or contended that this part of the will was not of difficult construction; and no doubt both or rather all parties were mistaken as to its meaning, if the meaning I attach to it, is the correct one.

In the well known case, *Cooper v. Phibbs*, L. R. 2 H. L. at p. 170, Lord Westbury, speaking of the maxim there alluded to, says the word "*jus*" is used in the sense denoting general law, the ordinary law of the country; and when that word is used in a sense denoting a private right the maxim has no application. That learned Judge also said: "Private right of ownership is a matter of fact; it may be the result also of matter of law."

In the case, *Earl Beauchamp v. Winn*, L. R. 6 H. L. at p. 234, Lord Chelmsford said: "With regard to the objection that the mistake (if any) was one of law. \* \* I would observe upon the peculiarity of this case, that the ignorance imputable to the party was a matter of law arising upon the doubtful construction of a grant. This is very different from the ignorance of a well known rule of law. And there are many cases to be found in which Equity upon a mere mistake of the law without the admixture of other circumstances, has given relief to a party who has dealt with his property under the influence of such mistake. Therefore, although when a certain construction has been put by a Court of Law upon a deed, it must be taken that the legal construction was clear, yet the ignorance, before the decision, of what was the true construction, cannot, in my opinion, be pressed to the extent of depri-

ving a person of relief on the ground that he was bound <sup>Judgment.</sup> himself to have known beforehand how the grant must be <sup>FERGUSON, J.</sup> construed."

In that case it seems to have been held and decided that acquiescence in what has been done will not be a bar to relief where the party alleged to have acquiesced has acted or abstained from acting through being ignorant that he possessed rights which would be available against that which he permitted to be enjoyed.

In that case the bill was to set aside an agreement for exchange made in 1864, and the decision proceeded upon the construction of a grant of March, 1799.

What is said in the former case, *Midland Great Western Railway of Ireland v. Johnson*, 6 H. L. C., at pp. 810 and 814, seem to be mere general statements touching the law in regard to mistake, and, should it be conceived that there is any difference, which I apprehend is a thing that cannot conveniently be asserted, it would be in my opinion proper to rely upon the later cases, and especially as the language used in them seems to be plain and unmistakeable.

I have examined the large number of cases and authorities that were referred to as having a bearing upon this immediate subject but I do not see that any good purpose would be served by referring further to them here.

The opinion I have formed is that the plaintiff was not, as a matter of law, bound to know the true construction of this will, and that what he was ignorant of was really his "private right of ownership" of the land, and it cannot be said that the means of knowledge of such right was sufficient: *Willmott v. Barber*, 15 Ch. D. 96, and my conclusion is that the plaintiff is not estopped, as contended for by the defendants, or forbidden to gainsay or deny what, under such mistake, he asserted or assented to or acquiesced in.

As to the moneys that were paid to and received by the defendants and the late Robert Baldwin, as before stated, I think the judgment of the Court of Appeal, particularly the language used by Lord Justice James, in the case,

Judgment. *Rogers v. Ingham*, 3 Ch. D. 351, sufficient authority  
FERGUSON, J. for saying that these moneys cannot be recovered back by  
the plaintiff.

For these reasons I am of the opinion that the appeal should be allowed, and I think the declarations mentioned in the concluding part of the judgment of Mr. Justice BURTON are the proper ones to be made.

As to the costs, I agree in the disposition of them made by the judgments of Justices BURTON and OSLER.

GALT, C.J., C.P. :—

This case is of considerable importance and the conclusion at which I have arrived has been reached after very careful consideration as unfortunately there are no decisions to assist one.

The action is brought by the appellant claiming to be entitled, under the will of the late Admiral Baldwin, to the whole of a certain piece of land therein mentioned; the respondents claim they are entitled to share equally with him.

The appellant is the eldest son of the late Hon. Robert Baldwin, the respondents, Kingstone and Macdonald, represent the late Robert Baldwin, who was a brother of the plaintiff, and the respondent, Mrs. Ross, is his sister.

On the 14th of August, 1850, the testator made his will; the only paragraphs to which it is necessary to refer are the 3rd and 8th.

[The learned Chief Justice read these clauses and continued:]

The Hon. Robert Baldwin died on the 9th of December, 1858. Admiral Baldwin, the testator, died on the 5th of January, 1866. Mrs. Baldwin died in 1870.

The statutes on which my judgment rests are the Act abolishing primogeniture, passed on the 2nd of August, 1851, to take effect on and after the 1st of January, 1852, and C. S. U. C. ch. 82 (1859).

By the express terms of the will no estate or interest



was to vest in the nephews until after the death of Mrs. Baldwin ; the result being that it was the intention of the testator that on the death of the tenant for life the estate should descend to his nephews in equal portions, and if either of them had died during his, the testator's, own life, the heir-at-law of the deceased nephew should stand in his place. The question then is who was the heir-at-law of the Hon. Robert Baldwin at his death and entitled to take on the decease of Mrs. Baldwin. The contention of Mr. Robinson was that as at the date of the will the appellant would have been the sole heir-at-law of his father he is still so to be considered as the statute to which I am about to refer has no reference to wills.

Judgment.

GALT,  
C.J., C.P.

In 1851, 14 & 15 Vic. ch. 6, was passed, entitled "An Act to abolish the right of primogeniture in the succession to real estate held in fee simple or for the life of another in Upper Canada and to provide for the division thereof amongst such of the relatives of the last proprietor as may best accord with the relative claims of such parties in the division thereof."

The preamble is as follows: "Whereas it is expedient to abolish the right of primogeniture in the succession of real estate held in fee simple or for the life of another in Upper Canada as such now exists according to the law in force in that section of the Province and to provide for the division of such real estate amongst such of the relatives of the person last seised or possessed and who shall have died without any testamentary disposition thereof as may best accord with the relative claims of such parties in the division thereof: Be it therefore enacted that whenever on or after the 1st of January, 1852, any person shall die seised in fee simple or for the life of another of any real estate in Upper Canada without having lawfully devised the same such real estate shall descend or pass by way of succession in manner following, that is to say:

Firstly, to his lineal descendants, and those claiming by or under them, per stirpes, in equal parts."

Before the statute was passed the word "heir" or "heir-at-

Judgment.

GALT,  
C.J., C.P.

law" meant "he who after his father's or ancestor's death had a right to inherit all his lands, tenements, and hereditaments." It was to "abolish" this meaning that the 14 & 15 Vic. ch. 6, was passed, and to declare who in future was to be considered "heir-at-law," and by using the word "abolish" it was the intention of the Legislature that after the 1st of January, 1852, the right of primogeniture should no longer exist. The meaning of the word "abolish" is shewn in Murray's English Dictionary, being, "To put an end to, to do away with, to demolish, destroy, or annihilate;" and in Latham's Dictionary, "To annul, to make void, put an end to, destroy;" therefore, the word "heir," or "heir-at-law," could not be used as conveying such a right. The statute was passed on the 2nd of August, 1851, but was not to come into operation until the 1st of January, 1852, so that all persons might have a knowledge of so vital a change in the law of inheritance. In *Hasluck v. Pedley*, L. R. 19 Eq. 271, the Master of the Rolls, in giving judgment, says: "It is said that testators make their wills on the supposition that the state of the law will not be altered; and it is contended that this will ought to be construed as it would have been under the old law. The answer to that is, that a testator who knows of an alteration in the law (as this testator must be presumed to have done), and does not choose to alter his will, must be taken to mean that his will shall take effect according to the new law." There could not be a case to which these words are more applicable than the present. The will was made in 1850, the law was altered in 1851. The devisee died in 1858, and the testator lived until 1866, fourteen years after the alteration.

At the date of the will the Hon. Robert Baldwin was living; consequently at that time he had no heir. By the terms of the will if he died during the life of the testator his heir-at-law was to succeed to his share on the death of the tenant for life. He did die in 1858, and the question is, who then was his heir?

The statute which came into force six years before his death had declared the right of primogeniture abol-

ished from and after the 1st of January, 1852. If the Hon. Robert Baldwin had himself died intestate would not all his children have been his heirs? There was in this case no specific devise or limitation, it was evident from the will of the testator the nephew was the object of his bounty, and in the event of his death whoever might be his heir-at-law was to take under the will.

Judgment.

GALT,  
C.J., C.P.

It is plain from the statute the intention of the Legislature was in no respect whatever to interfere with the power of persons to dispose of their property in any manner they chose, nor in any way whatever to interfere with the limitations under which the intestate held his estate. In the introduction and in the preamble the intention of the Legislature is declared to be to "abolish" primogeniture *not* in all cases, but "in the succession of real estate held in fee simple or for the life of another." This again is manifest from the 19th section, which is as follows: "And be it enacted that the estate of the husband as tenant by the curtesy, or of a widow as tenant in dower, shall not be affected by any of the provisions of this Act, nor shall the same affect any limitation of any estate by deed or will or any estate which although held in fee simple or for the life of another is so held in trust for any other person, but all such estates shall remain, pass and descend as if this Act had not been passed."

This does not apply to a case like the present where the devise is to a certain person, or in case of his death to his heir, but means that if the intestate himself held under a will or deed which had conferred any estate other than a fee simple, the limitation by such will or deed should not be interfered with, as for instance an estate tail limited to his eldest or any other son.

After the death of the Hon. Robert Baldwin, but during the life of the testator, viz., in 1859, the Statutes of Upper Canada were consolidated and re-enacted, consequently if there was any change the law must be read in cases arising after the consolidation in accordance with the Consolidated Statute. We find then in chapter 82 (which is the one

Judgment.

GALT,  
C.J., C.P.

now to be considered) no reference to the law of primogeniture ; it was evidently treated as "abolished," and by the express words of the 23rd section "when on or after the first day of January, 1852, any person shall die seised in fee simple or for the life of another of any estate in Upper Canada without having lawfully devised the same such real estate shall descend or pass by way of succession in manner following, that is to say : Firstly, to his lineal descendants and those claiming under them in equal shares." There is no exception. There is a similar clause to the 19th section to which I have already referred, viz., the 4th section, but which, for the reasons I have given, does not in my opinion alter the case. After this positive statutory declaration I cannot read "heir-at-law" in any other manner than that pointed out. It was argued by Mr. Robinson that at the time this will was executed it spoke from its date ; that is in one sense true, viz., that after acquired freehold property would not pass under a will previously executed, but it has no application to the present case. The will by its express terms refers to a future event, viz., who was to take the share of one of the devisees dying during the life of the testator. There was at the date of the will no heir. Suppose, for instance, the late Phoebe Maria Baldwin, who was the eldest child of the Hon. Robert Baldwin, had been his only child when the will was made, could the will be construed so as to exclude all his after born children ? Surely it would be a question as to who was his heir-at-law at the time of his death, and years before it took effect the law had expressly declared "that the land should descend to his lineal descendants in equal shares," in other words, that all his children should be his heirs.

If the Hon. Robert Baldwin had survived the testator for only one day it is plain such would have been the case and I can arrive at no other conclusion than that the same effect must be given to the devise under the circumstances that have taken place, and that this appeal must be dismissed.



The case may be summarized as follows : The statute was passed "to provide for the division of such real estate amongst such of the relatives of the person last seised or possessed and who shall have died without leaving any testamentary disposition thereof as may best accord with the relative claims of such parties in the disposition thereof." Robert Baldwin did not die seised or possessed, therefore the statute has no application to his estate. Admiral Baldwin did die seised and possessed having made a testamentary disposition of his estate, therefore the statute does not apply to the disposition of his estate. The question then is, who is entitled to take under the disposition of his will? The object of the statute was to define who, after the 1st of January, 1852, shall *inherit*, in other words, who shall be *heir-at-law*. This in its terms excluded a devise or a limitation by deed, because in the first case the person would not *inherit* but would take as devisee, and in the second would not *inherit* but would take under the provisions of the deed. The sole question then is, who was heir-at-law of Robert Baldwin at the time of his death? This is the express provision in the will, and in my opinion under the statute all his children constitute his heirs-at-law. This appears to me to have been manifestly the intention of the Legislature, for in the 24th section of 14 & 15 Vic. ch. 6, over and over again they refer to the person "who would have been heir-at-law had this Act not been passed."

But assuming I am in error respecting the estate of the plaintiff as heir-at-law to his father under the will, then as to the Statute of Limitations. The statute to which I am about to refer is R. S. O. (1877) ch. 108. By sub-section 2 of section 5, where the person claiming such land or rent claims the estate or interest of some deceased person who continued in such possession or receipt, in respect of the same estate or interest until the time of his death, and was the last person entitled to such estate or interest who was in such possession or receipt, then such right shall be deemed to have first accrued at the time of

Judgment.

GALT,  
C.J., C.P.

Judgment.

GALT,  
C.J., C.P. :

such death." The widow of Admiral Baldwin died in 1870; therefore the right of the plaintiff to the estate or interest in the land first accrued in 1870. Under the terms of Admiral Baldwin's will, assuming the plaintiff to have been the sole heir of his father, he became entitled to the land now in question as co-tenant with his uncle William Augustus Baldwin in 1870. The plaintiff in his evidence at the trial, stated in answer to the question: "After the widow's death, in what way was this property Russell Hill dealt with? My uncle William Augustus Baldwin claiming the other half, he, as executor of my father, divided the rents as they fell in equally among my sister Mrs. Ross, my brother Robert and myself." There is an error in this. The Hon. Robert Baldwin had no interest in this land, but that is of no consequence; what this evidence proves is, that William Augustus Baldwin being entitled as co-tenant to enter into possession, did so, and received the whole of the rents as they fell due in the following manner, one-half for himself, one-sixth for the plaintiff, one-sixth for Mrs. Ross, and one-sixth for the late Robert Baldwin; that is to say, he was in possession of the entirety partly for his own benefit, and partly (if the plaintiff's contention be correct) for the benefit of persons other than the person entitled to the other share. To use the words of the witness himself: "He had a half himself, and then the other half was divided into three." In answer to the question, "How long did that condition of things run along? Up to the death of my uncle William Augustus Baldwin." William Augustus Baldwin died in 1883, consequently that state of things continued for a period of thirteen years; and in fact all parties continued so to act until the partition deed in 1885. From this state of facts Mrs. Ross and the late Robert Baldwin were as much in possession of two-sixths of the land as the plaintiff was of the other sixth.

By the 11th section, "Where any one or more of several persons entitled to any land or rent, as co-parceners, joint tenants or tenants in common have been in possession or

receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of such last mentioned person or persons, or any of them."

Judgment.

GALT,  
C.J., C.P.

Under these express words the possession of William Augustus Baldwin of the one-sixth part of the land or rent for which he accounted to Mrs. Ross, and the other sixth for which he accounted to the late Robert Baldwin, cannot be held to have been the possession or receipt for the plaintiff, and such possession continued for upwards of thirteen years from the time when the right of the plaintiff first accrued. By section 4, "No person shall make an entry or distress, or bring any action or suit to recover any land or rent, but within ten years next after the time at which the right to make such entry or distress, or to bring such action or suit, first accrued to some person through whom he claims." By sub-section 1 of section 2, "'Land' shall extend to messuages and all other hereditaments, &c., and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance, or estate for any life or lives, or other estate transmissible to heirs and to any possibility right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, are in possession, reversion, remainder or contingency." There can be no doubt that under these terms the plaintiff, on the death of the widow (assuming, which I do for the present argument, that he was co-tenant of the whole with his uncle), might have brought an action to establish his right to a half-interest in place of one-sixth. He did not do so; his uncle as co-tenant received and accounted for two-sixths to persons other than himself for upwards of thirteen years and in my opinion the right of the plaintiff to bring this action is barred by

Judgment. the express words of the statute which declares that the  
GALT, word "land" shall extend not only to the entirety of any  
C.J., C.P. "land or rent" but to any share thereof, and if it does not apply to the present I cannot imagine a case to which it would be applicable.

Without objection on the part of the plaintiff, his uncle, William Augustus Baldwin, remained in possession of two-sixths of the land for which he accounted as co-tenant to his other nephew and niece for a period of thirteen years. It must be borne in mind the Statutes of Limitations were passed to quiet titles. It is true that in many cases the effect has been to enable dishonest persons to acquire property to which they had no title whatever, having entered as trespassers without a pretence of right, but such is not the present case. After the death of Mrs. Baldwin all parties acted in unison, there was no dispute, although there may have been a mistake; the defendants believed themselves to be in the position in which they now claim they really are, and the plaintiff assented to this claim up to the year 1886. As said by Dallas, C. J., in *Tolson v. Kaye*, 3 Brod. & B. at p. 222. "I cannot agree in the position that statutes of this description ought to receive a strict construction, on the contrary I think they ought to receive a beneficial construction, with a view to the mischief intended to be remedied, and this is pointed out by the very first words of the statute which are 'for quieting of men's estates and avoiding of suits.'" Park, J., in the same case: "It has been urged that the plaintiff's case is entitled to the indulgent consideration of the Court, but I think the indulgence of the Court ought to incline the other way, for unless the limit pointed out by the statute be observed, no man is safe, but may be reduced to poverty after long and undisputed possession." There could not, in my opinion, be found a case to which those words are more applicable than the present. The plaintiff and his brother and sister acted as co-tenants, not only till the death of their uncle, but until the execution of the partition deed of the 21st of January, 1885, whereby the trustees



of the then deceased William Augustus Baldwin, the plaintiff and his brother and sister, divided this "land" between them in accordance with what they believed to be their respective rights, and it must not be over-looked that by the operation of that deed Mrs. Ross and the late Robert Baldwin acquired a half interest in the land now sought to be recovered by the plaintiff, by the conveyance to them by the trustees of their uncle of his undivided interest in the lands conveyed to them. It is true, if the contention of the plaintiff be correct, they gave no value for such conveyance, but the conveyance was made to them in good faith and they are entitled to retain it. Under these circumstances, as I have already said, I cannot imagine a case in which the beneficial effect of the Statute of Limitations would be more applicable than the present.

Judgment.

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GALT,  
C.J., C.P.

*Appeal allowed without costs,*  
GALT, C.J., C.P., *dissenting.*

UPON the settlement of the minutes of the judgment in this Court, it was shown on behalf of the appellant that after the question as to the construction of the will had been raised, and after the appellant had notified the respondents of his claim that he was entitled absolutely to the lands in question, but before the writ in this action was issued, the respondents had sold large portions of the land allotted to them by the partition deed of January, 1885, and in some instances had received payment therefor in full, and in other instances had received payment of part only of the purchase money, and had taken mortgages to themselves to secure the balance of it. It was also shown that the respondents at the time the claim was made held certain mortgages taken to secure portions of purchase money of lands sold before the claim was made, and that payments on account of both kinds of mortgages were made after the claim was made and before the writ was issued. The appellant contended that the respondents should pay to him all purchase money

so received by them, and all moneys so received by them on account of mortgages, and should transfer to him all mortgages still unpaid, and the Registrar so held.

The respondents moved to vary the minutes, and the motion was heard on the 15th of November, 1890.

*McCarthy*, Q. C., and *W. Barwick*, for the respondents.

*Robinson*, Q. C., and *H. Cassels*, for the appellant.

On the 17th of November, 1890, the judgment of the Court was delivered as follows by

FERGUSON, J. :—

1. From the time the plaintiff made the claim to be the sole owner of the one half, and the defendants had notice of the fact that he did so, he was not a party to the payment of moneys to the defendants, and it is only on the ground of his being a party to the payment that he is prevented from recovering the moneys back.

2. The case on the authority of which it was held that the plaintiff could not recover the moneys back is confined to moneys alone, and does not at all reach to the recovery or not of property other than money, or to any case in which the property of the owner has been converted into other property (not being money), and but for that case the decision might have been different even as to the money paid over.

3. The defendants' taking mortgages for a part of purchase moneys on sales made by them seems to me to be nothing more or less than a conversion *pro tanto* of the plaintiff's lands into other property (not being money).

4. Owing to the finality in idea of the payment of money, and the possible and probable conduct in consequence of the persons receiving it in respect of the subject matter, and their own circumstances, it rather seems to stand upon a footing different from the exchange for or conversion into property other than money.

5. I think the plaintiff entitled to the benefit of the mortgages taken *pro tanto* for his lands upon sales made by the defendants; and I think he is entitled to all moneys received by the defendants after the making of his claim and notice to them thereof.

*Motion dismissed.*

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SULLIVAN V. FRANCIS.

*Execution—Fraud—Collusive purchase—Division Courts—Practice—  
Appeal—Notes of evidence—Security.*

The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money :—  
*Held*, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant.

Appeal allowed and new trial ordered.

The right of appeal from the Division Court is not lost because the judge omits in an appealable case to take down the evidence at the trial in writing.

The security to be given on a Division Court appeal is now regulated by 53 Vic. ch. 19, (O.), and is to be either by a bond in the sum of \$100, or a cash deposit of \$50.

THIS was an appeal by the claimant Corrigan from a *Statement*. judgment in favour of the execution creditor in an interpleader suit in the 7th Division Court of the United Counties of Stormont, Dundas and Glengarry, and came on to be heard before OSLER, J. A., on the 29th of November, 1890.

*H. H. Dewart*, for the appellant.

*A. H. Marsh*, Q.C., for the respondent.

Judgment. December 12th, 1890. OSLER, J. A.:—

OSLER,  
J.A.

Two preliminary objections to the hearing were taken by Mr. Marsh.

(1) That the learned junior Judge of the Division Court had not taken down the evidence in writing as required by the statute.

(2) That it did not appear in any of the proceedings at the trial that the value of the goods and chattels claimed exceeded \$100 so as to bring the case within the appellate jurisdiction.

As to the first objection, section 115 of the Division Courts Act enacts that in all actions in which "the sum sought to be recovered" exceeds \$100, the judge shall take down the evidence at the trial in writing unless the parties expressly waive the right to appeal.

Nothing in the Act makes the jurisdiction to entertain the appeal dependent upon the evidence having been reduced to writing. The omission of the judge to perform his duty in this respect (and in this case I am sure it was a mere inadvertence) cannot deprive the unsuccessful party of the right of appeal, which section 148 confers upon him. When the judge cannot supply the evidence from his notes or recollection in a satisfactory manner, or if the parties cannot agree as to what facts were proved, it may become necessary to grant a new trial.

I am inclined to doubt whether section 115 applies to the case of interpleader. It comes from the Division Court Act of 1880, which gave the right of appeal in connection with the extended jurisdiction in contract then conferred upon the Division Courts. That right was held not to extend to interpleader and garnishee suits: *In re Turner v. Imperial Bank of Canada*, 9 P. R. 19; *Cameron v. Allen*, 10 P. R. 192. The law is now changed as to one by R. S. O. (1887) ch. 51, sec. 148 (2); and as to the other by 51 Vic. ch. 10, (O.) but it is by no means clear that section 115 is extended to interpleader. It is confined to cases in which "the sum sought to be recovered" exceeds \$100, an expression not



very appropriate to that proceeding. Moreover, an appeal is expressly given in interpleader, not only where the money, or the value of the chattels claimed, or proceeds thereof, exceed \$100, but also where the damages claimed or awarded against the party or the bailiff exceed \$60. I need not, however, further consider this point. It can only be important on a motion for a mandamus. The trial judge ought, no doubt, to take down the evidence in all cases where there is or may be, the right of appeal, whether the Act directs him to do so or not, and I am sure it is a duty which no judge would ever intentionally omit.

Judgment.

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OSLER,  
J.A.

As to the second objection:—I find among the papers one which is said to have been produced at the trial, a list, namely, of the goods said to have been bought by the claimant and then seized by the execution creditor and claimed in this action. I think it may fairly be assumed that the figures opposite to each article represent the price, and this would shew the value to be much more than \$100.

As to the merits:—From the affidavits before the Judge on the motion for a new trial, I gather that the execution debtor Francis was tenant to one Gwynne, and that his rent was in arrear. He had also given him a chattel mortgage. Gwynne employed a bailiff to distrain for his rent, and also to seize and sell the goods under the mortgage. They were offered for sale, and Francis, the tenant-mortgagor, bid upon them, and they were knocked down to him. The Division Court bailiff was present, and before delivery of the goods or settlement of the price, immediately seized them under Sullivan's execution. Francis then said that he was bidding merely as agent for and on behalf of Corrigan (the claimant), and the purchase money appears to have been settled by the latter giving his note for the amount.

The learned Judge gave a written judgment to the following effect:—

“Francis (execution debtor) had the right to bid in the goods at the sale for himself. He had no right to bid them in as agent for the claimant, thereby enabling the claimant.

Judgment.

OSLER,  
J. A.

to obtain the goods at a less sum than they would have brought if the claimant had himself bid, and by that means reducing the execution creditor's chance of being paid. The goods became Francis' property when knocked down to him, and subject to seizure under execution."

I had written thus far, and was about to refer to the further facts stated in the affidavits, when the learned Judge's certificate of the proceedings at the trial was handed into me.

Substantially he says: The goods were bid in by Francis and knocked down to him in his own name: that they were seized immediately after the sale, and were then claimed by Corrigan as having been bid in for him, though he was present at the sale and ought to have bid on them for himself; that Corrigan admitted that the effect of employing Francis as an undisclosed agent to bid for him was to deter Francis' neighbours from bidding against him and thus to keep down the price, and that the effect of keeping down the amount realized was to defeat other creditors; that "Francis was the purchaser at the sale, and no one would have thought for a minute that he was buying for Corrigan, and his neighbours actually refrained from bidding."

The learned Judge adds (and this must be regarded as his conclusion of law from the facts proved) that the employment of Francis as agent, if he was so employed, was, under all the circumstances, for a fraudulent purpose, and inequitable, and that the sale was either void altogether, or that Francis was the actual purchaser on his own account; that from the manner in which the sale was conducted, and the conduct of the parties, he felt that every effort possible was being made to defeat the execution creditor, "and that to uphold such conduct would be contrary to justice and public policy."

Having given the best consideration in my power to the evidence as reported, and the learned Judge's opinion as stated in his certificate, and the judgment accompanying the papers, I think there should be a new trial. I am not

satisfied that the precise grounds on which the rights of the parties depend have been quite kept in view or that the evidence as reported justifies the decision. I think it better to direct a new trial than to enter judgment for the claimant, because it is quite possible that the facts were more fully brought out than can now be ascertained, or that they may be so on another trial.

Judgment.  
OSLER,  
J. A.

The case to be made by the execution creditor is, either that Francis really bought the goods for himself; or, if he bought them for Corrigan, that the sale was fraudulent and void under the Act of Elizabeth, as amended by our statute R.S.O. (1887) ch. 96. If he bought for himself, *cadit quæstio*. That seems a little improbable, seeing that there was an execution in the bailiff's hands ready to be laid on. It will of course be for the Judge to say, looking at all the circumstances, whether that was the case.

Then did he buy for Corrigan? That is another question of fact. Corrigan had the right to employ him as his agent for that purpose, and if he really was so employed and so acted, then if there was no fraud the goods became Corrigan's although they were bid in in the debtor's name, and were knocked down to him by Gwynne's auctioneer. This I state plainly though it might seem to go without saying, because, in his judgment as reported, the Judge below expresses himself as if he thought Francis could not act at the sale as the undisclosed agent of Corrigan.

The next question is whether there was such a fraud in the sale, if a sale to Corrigan, as to entitle Sullivan, the execution creditor, to treat it as being no sale, and void as against his execution.

The case presented is a little unusual. The vendor, Gwynne, is no party to the alleged fraud, nor does he complain of it: *Twining v. Morrice*, 2 Bro. C. C. 326; *Delves v. Delves*, L. R. 20 Eq. 77; *Fuller v. Abrahams*, 3 Brod. & B. 116. His claim is probably paid in full. The charge is that by collusion or combination between Francis and Corrigan the goods in question were acquired by the latter at the landlord's sale at reduced prices, and at less than their

Judgment.

OSLER,  
J.A.

fair value. The execution creditor was thus, it may be said, delayed, hindered, and defrauded of his action, as a sale for full value would have produced a surplus beyond the landlord and mortgagee's claim which would have been subject to his execution: D. C. Act, R. S. O. (1887) ch. 51, sec. 228. The direct result of the asserted combination between the debtor and the purchaser would be to transfer to the latter some part of or interest in the debtor's property which would otherwise have gone towards payment of his debts, and with the fraudulent intent on the part of both of them to use the hand of the innocent vendor to effect that result. "The law requires a man to devote the whole of his property, with some trivial exceptions, fairly to the payment of his debts; it will not tolerate any subterfuge or device which is intended to divert it from that purpose. A sale under execution confers no exemption from this principle in behalf of those who participate in such device:" *Trimble v. Turner*, 13 Smed. & M. 348.

The case of *Stovall v. The Farmers and Merchants Bank of Memphis*, 8 Smed. & M. 305, bears a strong resemblance to the one before me. It was an interpleader between the execution creditor of one J., and the purchaser of certain goods (negroes) under a previous execution against him. It appeared that by connivance between J. and the purchaser, and a third person, persons were induced not to bid for the property whereby the purchaser got it for two-thirds of its value (by which J. was to be benefited, though this would be immaterial). The whole sale was held to be fraudulent and void as against the creditors of J. "It cannot be questioned that a purchase under such circumstances is fraudulent as to creditors. Such an understanding amounts to a combination to prejudice or defeat the just rights of creditors, and is consequently fraudulent as to them."

*Foulk v. McFarlane*, 1 Watts & Serg. 297. There it was shewn that under an execution against Foulk a sale was made to one Burkholder by reason of a fraudulent conspiracy between Foulk and Burkholder to prevent



purchasers from attending the sale or bidding for the property. A second execution creditor levied on the land after the sale, and McFarlane purchased under that execution. Held, in an action of ejectment brought against him by the first purchaser, that he was entitled to recover. "The fraudulent vendee gains no title to the land by the sale, nor interest in it, notwithstanding an innocent creditor may, by that very sale, obtain a good title to the money. It shall be a good sale as to the creditor, to entitle him to receive the money, and yet no sale as to the fraudulent vendee, to enable him to shelter the land against pursuit."

Judgment.

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OSLER,  
J.A.

I refer also to *Kilby v. Haggin*, 3 J. J. Marsh. 208; *Yoder v. Atterburn*, 7 T. B. Mon. 478; *Gilbert v. Hoffman*, 2 Watts 66; *Smith v. Schwed*, 9 Fed. Rep. 483; *Imray v. Magnay*, 11 M. & W. 267. These cases indicate the principles to be applied to the evidence at a future trial of the case.

I do not see that the claimant will have any right to protection in respect of the purchase money actually paid by him if it should turn out that the sale must be held fraudulent as against the execution creditor. The sale is good against every one but a creditor. It cannot be undone as against Gwynne, nor can Corrigan assert the rights of Gwynne as mortgagee or landlord or stand in his place for anything he may have paid or become liable to pay him. If he advanced his money to aid Francis in hindering, delaying, or defrauding his creditors he can claim no relief. If the transaction is set aside because of fraud as to existing creditors it becomes wholly void as to those creditors, and cannot stand in their way.

Then as to the evidence. The claimant has given value for the property (assuming that he really was the buyer) and therefore he is not lightly to be deprived of it. It will not be enough to prove merely that the execution debtor bid at the sale when the real purchaser was present and might have done so, nor that persons were present who refrained from bidding because they supposed that he was buying for himself. Combination must be proved between

Judgment.  
OSLER,  
J.A.

the purchaser and the execution debtor with the fraudulent intent or purpose to defeat creditors by keeping down the price, and it should also appear clearly that the goods were, as the result of this combination, sold for substantially less than they would fairly have brought at such a sale.

The appeal will therefore be allowed. Under all the circumstances I think it should be without costs.

I notice that the order, (dated 31st of October, 1890,) staying the proceedings for the purpose of the appeal, directs that the security to be given by the appellant shall be in a bond for \$300 or that the sum of \$200 shall be paid into Court. This is wrong and directly opposed to the Act of last session, 53 Vict. ch. 19 (O.) which limits the security to a bond for \$100 or a cash deposit of \$50.

*Appeal allowed, without costs, and new trial ordered.*

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## SAWYER V. THOMAS.

*Payment—Cheque of third person—Presentment—Delay in giving notice of dishonour—Debtor and creditor.*

Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment and if it is dishonoured notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor will be taken to

## ERRATUM.

BALDWIN V. KINGSTONE, 18 A. R. at p. 94.—The reference to Williams on Seisin at the end of paragraph 2, should be to Williams on Rights of Common and Other Prescriptive Rights, at p. 2.

during the month of February paid the plaintiffs \$200 on account of the note. On the 25th of March, they procured from one Peter Lillico, a private banker at Arthur, a cheque (as all parties agree in describing it) drawn by him upon the Imperial Bank at their agency at Fergus, Ontario, payable to the order of the plaintiffs, for the balance due upon the note, \$181.56. Across the face of this cheque was written by the drawer: "The cashier of the Bank of Hamilton will please pay at par." It was said that this bank was the agent in Hamilton of the Imperial Bank, but if the fact is important I see no evidence of it.

Judgment.

OSLER,  
J.A.

The plaintiffs received the cheque on the morning of the 3rd of April, and on the same day paid it into their own bank, the Bank of British North America in Hamilton. It was placed to their credit in account, and the plaintiffs entered it in their own books as cash received and the note as paid. On the 9th of April they wrote to the defendants acknowledging receipt of their letter of the 25th of March "enclosing \$181.56 in full payment of your note due 1st of February, 1890. Thanking you for the same we herewith return your note cancelled." On the 11th of April the cheque was presented by the Imperial Bank, described in the protest as the holders thereof, to their agency at Fergus and was dishonoured. Notice of dishonour was received by the plaintiffs on Saturday, the 12th of April, as the learned Judge finds. On the 15th of April, in answer to a letter to them from Lillico asking for time, the plaintiffs wrote: "We trust you will pay, will hold for a short time as requested." On the 18th they wrote defendants saying that Lillico's draft had been refused payment and that they must ask the defendants to hold their note which they had returned "as good to them for the amount until paid." This was the first intimation the defendants had of the dishonour of the cheque.

The plaintiffs attempted to account for the delay in presentation by the alleged course of business in the bank through whom the cheque was forwarded for collection, though as to this no evidence was given. What appears is that they deposited it in their own bank on the day they received it, the 3rd of April. That bank presented it to the Bank of Hamilton on the 5th of April, (the 4th being a bank holiday, Good Friday), who refused payment as the learned Judge finds, but apparently took it for collection. They remitted it to their Toronto branch for that purpose, where it arrived on Easter Monday, the 7th, and is marked as received by them on that day. Thence it was passed into the Imperial Bank head office, Toronto, and that bank sent it on to their Fergus agency where it was payable, endorsed thus, "Remitted by post for account



of the Imperial Bank of Canada, Toronto." When it was received by the Imperial Bank in Toronto: when sent on by them to their Fergus agency: and when received there, does not appear. It was not presented, as I have said, until the 11th of April.

*Redpath v. Kolfage*, 16 U. C. R. 433, appears to me to cover this case. There, it is true, the cheque, which was the cheque of a third person not endorsed by the vendee, was given in payment of the price upon a sale of goods made at the time, while here the case is of a similar cheque given, as I hold, on account of an antecedent debt, and therefore *prima facie* as conditional payment only: *Bottomley v. Nuttall*, 5 C. B. N. S. at p. 148; *Heywood v. Pickering*, L. R. 9 Q. B. 428; *Belshaw v. Bush*, 11 C. B. at p. 205; *Currie v. Misa*, L. R. 10 Exch. 153, 163, 164; *Cohen v. Hale*, 3 Q. B. D. 371.

But the Court held that, apart from that ground of defence, namely, that the cheque had been taken in exchange, the plaintiffs by their laches had made it their own, though they appear to have been even less in fault than the plaintiffs in the case at bar.

Robinson, C.J., said: "The plaintiffs, it is true, did present the cheque promptly. In that respect there was no neglect on their part. They also at once called on Henderson & Co. (the makers of the cheque), and endeavoured to get payment from them, which was proper. But if they ever intended to come back upon the defendant from whom they got the cheque, as being still liable for the amount, in consequence of its remaining unpaid, they should have lost no time in giving him notice that the cheque was dishonoured, and that they intended to look to him.

\* \* They allowed a week to elapse, during which they were endeavouring to get payment from Henderson & Co., before they wrote to defendant informing him of what had happened. \* \* According to all the cases I can find upon this point the plaintiffs lost their recourse against the defendant by delaying a week or more before they took any steps to give him notice."

Judgment.

OSLER,  
J. A.

Judgment.

OSLER,  
J.A.

There is much also in the case of *Hopkins v. Ware*, L. R. 4 Exch. 268, which supports the view that the long delay in giving notice to the defendants of the non-payment of the cheque, whereby they lost an opportunity of using diligence in resorting to their own debtor, is evidence of laches and consequent injury which entitles them to say that the plaintiffs have made the cheque their own. That was the case of the cheque of a third person, not endorsed by the debtor, given by the debtor's agent on account of an antecedent debt, and there had been unreasonable delay in presenting it and giving notice of dishonour.

I hardly think this case can turn upon the question whether the presentment on the 11th was in reasonable time, for there is no evidence that the delay until that time has prejudiced the defendants. Had the case been that of an endorser, I should have little difficulty in deciding that the cheque had not been duly presented in accordance with the rule of the law merchant: *Chalmers on Bills*, 3rd ed. p. 135. The plaintiffs had the right under the circumstances to retain it until the 5th of April, to present it on that day to the Bank of Hamilton in accordance with the express request of the drawer to that bank to honour it, and the implied authority of the defendants, but making due allowance for the intervening non-secular days, it should have been at home and presented in Fergus at the latest by the 10th, and probably by the 9th of April.

There is no evidence to shew that the circuitous route by which it arrived there was a proper one, so as to justify any extension of the time for presentment. Even if it was proper, there is an unexplained delay in transmitting the cheque from Toronto, where it arrived on the 7th of April, to Fergus, where it was presented on behalf of the Imperial Bank (head office) to their own agency there on the 11th.

As against the defendants however, who are not parties to the cheque, it cannot be said that any delay is unreasonable unless it has caused a loss. Such persons stand in a very different position from an endorser: *Swinyard v.*

*Bowes*, 5 M. & S. 62; *Van Wart v. Woolley*, 3 B. & C. 439, 445-6; *Hopkins v. Ware*, L. R. 4 Exch. at p. 271; *Carter v. White*, 25 Ch. D. 666, 671. I note *Smith v. Mercer*, L. R. 3 Exch. 51, as a case which turned upon its own special circumstances.

Judgment.

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OSLER,  
J.A.

As against the plaintiffs suing upon the original debt, the defendants must shew that there was laches which has resulted in injury to them. It was enough for the plaintiffs to negative the presumption of payment arising from the delivery of the cheque, and this they did by shewing that it remained dishonoured in their hands. It then devolved upon the defendants to prove that the presentment was not within a reasonable time, and consequent injury, and in the absence of evidence that the cheque would have been paid, or might have been paid had it been presented on the 9th or 10th of April, or that the drawer or drawees had failed between that time and the time when the cheque was actually presented, I think it is difficult to say that anything that the defendants are entitled to call laches in making presentment has been shewn: *Owens v. Quebec Bank*, 30 U. C. R. 382; *Robinson v. Hawksford*, 9 Q. B. 52; *Serle v. Norton*, 2 Moo. & R. 401, 404; *Lewis v. Rand*, 3 C. B. N. S. 442; *Bishop v. Rowe*, 3 M. & S. 362; *Hopkins v. Ware*, L. R. 4 Exch. 268, 271; *Gallagher's Executors v. Roberts*, 2 Wash. C. C. R. 191; *Smith v. Buchan*, 27 U. C. R. 106.

But assuming that the defendants cannot complain of a presentment on the 11th, it remains to consider what the plaintiffs afterwards did or omitted to do, and this must be looked at in the light of the fact that they had on the 9th of April returned the defendants their note cancelled and paid in full. They had notice of the dishonour of the cheque on the 12th. They knew that the defendants were interested in it, and instead of at once giving them notice that they still looked to them for payment of the note, which they had actually returned to them, and had expressly receipted for as paid in full, they enter into correspondence with the drawers of the cheque promising to hold it over for a short time, and wait a

Judgment.  
OSLER,  
J.A.

whole week before writing to the defendants. They were I think bound to be specially diligent in giving the defendants notice of their intention to resort to them for payment, since they had already given them the best reason to believe that they need take no trouble about the cheque. The necessary consequence of their delay was to lull them into security and to deprive them of the opportunity which they would otherwise have had of obtaining repayment in whole or in part of the money which they had paid to Lillico.

To adopt the language of Bramwell, B., in *Hopkins v. Ware*, L. R. 4 Exch, at p. 271 : Though the cheque was originally neither given nor taken in satisfaction, the plaintiffs have not dealt with it as if the defendants had an interest in it. They have kept it and dealt with it as they had no right to keep and deal with it except on the footing that it was their own, without recourse to the defendants. It, therefore, became their own, and the defendants were discharged.

The case of *Ryan v. McConnell*, 18 O. R. 409, may be referred to, where the notes of third persons were transferred without endorsement, as collateral security ; and see the cases noted below.

For these reasons the appeal is dismissed with the usual costs.

*Appeal dismissed with costs.*

NOTE.—Cheque proved to have been taken in payment or in accord and satisfaction : *Carmarthen R. W. Co. v. Manchester R. W. Co.*, L. R. 8 C. P. 685 ; *Bidder v. Bridges*, 37 Ch. D. 406.

Discharge of defendant by laches of plaintiff in returning bank notes taken in payment or exchanged : *Camidge v. Allenby*, 6 B. & C. 373 ; *Lichfield Union v. Greene*, 1 H. & N. 884 ; *Turner v. Stones*, 1 D. & L. 122.

Laches in not presenting promissory notes taken on account of debt ; non-presentment excused by maker's insolvency : *Robson v. Oliver*, 10 Q. B. 704. From same case as reported in 11 Jurist, 1056, and 16 L. J. Q. B. 437, it appears that the notes were banker's notes.

Presentment by transmission to drawee by post : *Hare v. Henty*, 10 C. B. N. S. 65 ; *Bailey v. Bodenham*, 16 C. B. N. S. 288 ; *Prideaux v. Criddle*, L. R. 4 Q. B. 455 ; *Heywood v. Pickering*, L. R. 9 Q. B. 428.

Presentment to agency of bank on which cheque drawn : *Prince v. Oriental Bank Corporation*, 3 App. Cas. 325.

Effect of memorandum on cheque : *Rose-Belford Printing Co. v. Bank of Montreal*, 12 O. R. 544 ; *Bailey v. Bodenham*, 16 C. B. N. S. 288.



## BLACKLEY V. KENNEY (NO. 2.)

*Principal and Surety—Extending time—Discharge—Notice of Suretyship.*

THIS was an appeal by the plaintiff from the judgment Statement of ROBERTSON, J., reported 19 O.R. 169, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 29th of May, 1890.

*Aylesworth*, Q.C., and *W. Macdonald*, for the appellant.  
*A. C. Galt*, for the respondents.

The facts are fully stated in the report of the case below and in the reports of previous appeals to this Court, 16 A.R. 272, and 16 A.R. 522.

January 13th, 1891. The Court allowed the appeal Judgment. with costs, upon the ground (not taken in the Court below) that as there was no evidence whatever of the plaintiff's knowledge of the covenant under which the alleged suretyship arose and as he had no reason to think that the relation of principal and surety existed, his dealing with the debtor did not work a release, assuming that that relationship did exist.

Per HAGARTY, C.J.O., and OSLER, J.A.—The defendant as a volunteer could not set up the rights of a surety under the covenant of the mortgagor, the grantor of the equity of redemption, against the plaintiff, the creditor of the mortgagor. *Northwood v. Keating*, 18 Gr. 643, referred to.

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## HUNTINGTON v. ATTRILL.

*Judgment—Foreign judgment—Penalty—Action to enforce—Foreign law—Lex fori.*

The Courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action.

The Court being divided in opinion, both as to the penal nature of the judgment sued on and as to whether the law applicable to such question was that of the foreign country or of this Province, the appeal was dismissed, and the judgment of STREET, J., 17 O. R. 245, was affirmed.

## Statement.

THIS was an appeal from the judgment of STREET, J., reported 17 O. R. 245.

The action was brought by the plaintiff on a judgment recovered by him in the Supreme Court of the State of New York in an action in that Court against the defendant and one Soutter as directors in a joint stock company having its head office in the State of New York, duly incorporated under the laws of that State, called "The Rockaway Beach Improvement Company." The plaintiff, claiming to be a creditor of the company for money loaned by him to it, proved that the defendant and Soutter, as directors of the company, had, contrary to the provisions of certain Acts of the State of New York, signed certain certificates in relation to the company's affairs which were false, and under a statutory provision making a director under such circumstances personally liable for all debts of the company contracted during his directorship, recovered judgment for the full amount of his claim.

The action was tried before STREET, J., on the 10th of September, 1888. The plaintiff rested his case on an exemplification of the foreign judgment and evidence identifying the plaintiff and the defendant with that judgment, and on the evidence of two legal experts proving that the judgment was a final one, and that the Supreme Court of New York was a Court of Record so as to admit proof of the exemplification by certificate under R.S.O. (1887) ch. 61, sec. 27. There were various grounds of defence set up by the

Statement.

defendant but at the trial the issue was narrowed down to one, viz: that the foreign judgment had been recovered under a penal statute, and was not enforceable here, and in proof of this it was shown by cross-examination of one of the experts called by the plaintiff, that the action would be looked upon as a penal one in the State of New York, and upon this ground STREET, J., dismissed the action with costs.

The plaintiff appealed and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 23rd of May, 1890.

*Kingsmill*, Q. C., and *H. Symons*, for the appellant. Assuming that the action in the State of New York might be spoken of in a wide sense as a "penal" action still it is not a *criminal* action but at the most a civil action to recover penalties, and such an action does not come within the rule that the Courts of one country will not enforce the penal laws of another. In that rule "penal" means something of a criminal nature. It may be that an action cannot be brought in this country to recover a mere penalty imposed by the law of a foreign country but if a judgment for that penalty is recovered in the foreign country then the rights of the person holding the judgment are higher. The foreign judgment gives rise to a new and independent obligation which it is just and expedient to recognize and enforce: *In re Henderson, Nouvion v. Freeman*, 37 Ch. D. 244; *Henderson v. Henderson*, 6 Q. B. at p. 298; *Spencer v. Brockway*, 1 Hammond, 259. It is not contended that there is such a merger of the original cause of action as to prevent the plaintiff from suing on that original cause of action, but he has the option of insisting on the judgment as *res judicata* if he prefers to sue on it. The true rule is that English Courts will give effect to foreign judgments in civil actions involving pecuniary demands unless there is something in the recovery repugnant to the policy of English Law, and that cannot

Argument.

be said to be the case with regard to an action under a statute making a person liable for false statements or representations: *Castrique v. Imrie*, L. R. 4 H. L. 414; *Godard v. Gray*, L. R. 6 Q. B. 139; *Kingsmill v. Warrenner*, 13 U. C. R. 18; *Phillips v. Eyre*, L. R. 6 Q. B. 1; *United States of America v. McRae*, L. R. 3 Ch. 79. The text books on which the learned Judge below relies, will not be found when the cases cited in support of the text are looked at, to refer to actions on judgments of the kind now in question, but to original actions for penalties or to criminal sentences such as attainder, suspension of civil rights, &c., and *Folliott v. Ogden*, 1 H. Bl. 123; 3 T. R. 726; and *Wolf v. Oxholm*, 6 M. & S. 92, are cases of this kind. The case of the *State of Wisconsin v. The Pelican Insurance Co.*, 127 U. S. 265, was an action to recover penalties imposed for breach of municipal laws, and we admit that mere police or revenue regulations such as were there in question, are not enforceable in another country. But this action in the State of New York was really an action *quasi ex contractu*. Persons forming this company were granted protection from liability provided certain conditions were observed by them, and failure to observe these conditions simply removed that protection and left them in the position of partners. Our own statutes relating to companies contain provisions very similar to the provisions of the New York Statute, and there is nothing therefore in the relief granted under the New York Statute that can be considered as at all opposed to the spirit of our law. See also *Neal v. Briggs*, 12 Ga. 104; *Attrill v. Huntington*, 70 Md. 191.

*McCarthy*, Q.C., and *A. R. Creelman*, Q.C., for the respondent. This was clearly a penal action. The clause of the New York Statute under which the action was brought, gives a remedy not only against the directors but against the officers of the corporation, and goes therefore much further than merely removing a protection, previously granted, from the persons becoming incorporated. The judgment effects no merger of the original cause of action, and the plaintiff must be regarded as simply in the same



position as though he were now suing on the original cause of action, and clearly that cause of action could not be recognized in the Courts of this country. The Statute imposes a penalty which is in the nature of a fine of indefinite character, and to an indefinite amount, and is clearly penal according to the decisions in the State of New York, and the evidence of the experts in the law of that State, and that concludes the question: *Merchants' Bank v. Bliss*, 35 N. Y. 412; *Stokes v. Stickney*, 96 N. Y. 323; *Flash v. Conn*, 109 U. S. 371; *First National Bank of Plymouth v. Price*, 33 Md. 487; *Steam Engine Co. v. Hubbard*, 101 U. S. 188. Clearly the Courts of this country in accordance with the law laid down by the Courts in England will not enforce a foreign judgment founded on a statute providing a penalty of a purely police and punitive nature as this is: *Folliott v. Ogden*, 1 H. Bl. 123; 3 T. R. 726; *Wolf v. Oxholm*, 6 M. & S. 92; *Lynch v. Government of Paraguay*, L. R. 2 P. & D. 268; *Batthyany v. Walford*, 36 Ch. D. 269. The liabilities imposed upon directors by English and Canadian statutes are not analogous to that now in question, the former affecting only a limited class, the latter being indefinite in nature and extent.

*Kingsmill*, Q. C., in reply.

January 13th, 1891. HAGARTY, C. J. O. :—

An examination of the American authorities, if they are to govern this case, warrants the conclusion arrived at by my brother STREET in his very careful judgment.

The case of *Merchants' Bank v. Bliss*, 35 N. Y. 412, decided in the New York Court of Appeals in 1866, may be said to be a leading authority, and seems to have been followed extensively. It was adhered to in the same Court as *Wiles v. Suydam*, 64 N. Y. 173, (1876.)

In the Supreme Court of the United States the law is reviewed: *Flash v. Conn*, 109 U. S. 371, (1883). There is no independent expression of opinion by the Supreme Court. They say: "We think this is a case where

Judgment. the construction of the State Court is entitled to great, if not conclusive, weight with us. It is the settled construction of a law of the State upon which the rights and liabilities of a large number of its citizens must depend. \* \* . It is clear that confusion and uncertainty would result should the State and Federal Courts place different constructions on the section. Such a result ought, if possible, to be avoided." They cite *Burgess v. Seligman*, 107 U. S. 20, where it is said: "The Federal Courts will lean towards an agreement of views with the State Courts if the question seems to them balanced with doubt."

HAGARTY,  
C.J.O.

The latest case in the Supreme Court of *State of Wisconsin v. Pelican Ins. Co.*, 127 U. S. 265, in 1888, seems not to throw much light on this point. It was a suit by the State to recover money penalties enacted by the same State against a company for omitting to make certain returns directed by its statute.

It was of course held that this was beyond question an action for penalties *eo nomine*.

Section 10 of the Act in question in the New York cases provided that all the shareholders should be individually liable to the creditors to an amount equal to the stock held by them for all the company's contracts "until the whole amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed."

It was then provided that no suit should be brought against a stockholder till execution should be returned unsatisfied against the company.

This section was also reviewed by the Supreme Court in *Flash v. Conn*, 109 U. S. 371, and it was held, confirming the Court below, that it created a liability arising upon contract. "Every one who becomes a member of the company by subscribing to its stock assumes this liability, which continues until the capital stock is all paid up and a certificate of that fact is made, published and recorded. The fact that the liability ceases when these events take

place does not change its nature and make that a penalty which would, without such limitation, be a liability founded on contract."

Judgment.  
HAGARTY,  
C.J.O.

The difficulty that presses me is my inability to accept the law enunciated by the American Courts as to this being an action to enforce or recover a penalty. Or, in other words, can it be decided merely on the doctrine—said to be universal,—that one country will not give effect to the penal laws of another?

There seems to be no doubt that one country will not enforce the revenue laws of another. It may be held to be also clear that neither in England nor here can a suit be maintained to recover a penalty, as (*e. g.*) a pecuniary fine or mulct on an individual forming part of the criminal law of a foreign country.

In Westlake's *International Law*, 3rd ed., p. 370, referring to the English cases generally cited—such as *Folliott v. Ogden*, 1 H. Bl. 123; 3 T. R. 726, and *Wolff v. Oxholm*, 6 M. & S. 92, there is quoted approvingly the language of Grose, J., in the first case, "that the penal laws of one country cannot affect the laws and rights of citizens of another." The author continues:—"As affecting the property of its own subjects, there seems to be no reason why the operation of a foreign penal law should not be admitted, always supposing that it is not one which shocks our national sense of right, as a penalty imposed for religious belief would do, or one to enforce which would be in fact to take a side in the internal politics of another country."

On the general doctrine that one State will not enforce the penal laws of another, we must determine what is a penal law, or what is the common understanding as to the meaning of such a term.

Penal laws are spoken of in such cases as *Hussey v. Moore*, Cro. Jac. 413: "Penal laws are intended those actions which are popular, and a penalty in gross for the king or for the party. \* \* There be three kinds of penal laws; *pœna pecuniaria*, *pœna corporalis*, *pœna*

Judgment. *exilii*." This last definition is adopted in the Law Dictionaries of Tomline, Wharton, &c. The latter author says: HAGARTY, C.J.O. "Penal laws are those which prohibit an act and impose a penalty for the commission of it—penal statutes those which impose penalties or punishments for an offence committed."

Parke, B., says in *Earl Spencer v. Swannell*, 3 M. & W. at p. 162, an action on 2 & 3 Edward VI., ch. 13, for treble value of tithes not set out:—"A penal law is a statute which imposes a penalty, and the Statute of Edward VI. does impose a penalty, for it trebles the original duty by way of punishment, thus making the defaulting party liable to a forfeiture beyond the amount of the duty withheld. It is true that it is an action not barely penal, for, on the principle that it is for a duty also, such action lies by executors within the equity of the statute *de bonis asportatis in vitâ testatoris*; (citing *Moreton v. Hopkins*, 2 Sid. 407) and after a recovery in this action, the plaintiff cannot recover the tithe in any other suit."

There seems no doubt that under the language of the Act the amount recoverable is spoken of as a fine or forfeiture.

In the *Hussey v. Moore* case, Houghton and Doderidge, JJ., said that penal laws are not those that give greater damages. See also 4 Chitty's Statutes, 4th ed. p. 1253.

As to the New York Statute:—I cannot consider that the section on which this action is founded falls within the general definition of a penal law or statute, or within the general understanding of mankind as to what may properly be called a penal law. It is not of general application, as a provision that any director or officer of a trading corporation not making or filing a declaration or statement required to be made should pay a named penalty or suffer a named punishment.

We must, I think, consider what the true meaning of the enactment is, judging it by its own words.

There must first be noted the direction of the Act that the directors must be stockholders.



Section 18 directs an annual report to be made stating the amount of capital and proportion actually paid in, to be signed by the president and a majority of the directors, verified by oath of president or secretary.

If they fail so to do, all the directors shall be jointly and severally liable for all the debts of the corporation, and for all that shall be contracted before such report shall be made.

If judgment is recovered against any director, all shall contribute a rateable share of the amount paid by such director, with right of action for contribution.

Section 21. If any certificate or report made, or public notice given by the officers of any such corporation shall be false in any material representation, all the officers who shall have signed the same shall be jointly and severally liable for all the debts of the corporation contracted while they are officers thereof.

Section 36 provides penalties in money payable to the State for omissions in using as directed the word "limited."

Section 37 makes all stockholders individually liable to the creditors to an amount equal to their stock for all debts until the whole amount of capital be paid in, and a certificate made and recorded. Execution first to be returned against the company, with right of contribution rateably from other stockholders.

The directors within thirty days after payment of the last instalment of capital, shall make a certificate stating the amount so paid in, to be signed and sworn to by the president and a majority of directors, and to be recorded within the thirty days.

It is stated that on the 18th of February, 1880, a certificate for the formation of the company under the general Act was filed by the defendant Attrill, with other promoters, under ch. 611 of the Act of 1875. And on the 29th of February, 1880, the Secretary of State issued to the defendants and others the certificate of organization under section 7, which was duly recorded. Capital, \$700,000.

On February 26th, the defendants were elected directors.

Judgment.

HAGARTY,  
C.J.O.

**Judgment.** On June 15th, the debt to the plaintiff was incurred by his loan to the company of \$100,000.

**HAGARTY,  
C.J.O.**

On the 30th of June, 1880, the defendants as directors signed the certificate under section 37.

THE ROCKAWAY BEACH IMPROVEMENT COMPANY,  
LIMITED.

CERTIFICATE OF FULL PAID STOCK.

CITY, COUNTY AND STATE OF NEW YORK, (ss.)

We, the undersigned, the president and a majority of the directors of the Rockaway Beach Improvement Company, Limited, being severally duly sworn each for himself, says that he is a director, and R. Prindiville, the president of the Rockaway Beach Improvement Company, Limited, that the amount of capital paid in in full is the sum of seven hundred thousand dollars, being the full amount of the capital stock of the said company.

Dated New York, June 30th, 1880.

Subscribed and sworn to be- } R. PRINDIVILLE, *President*,  
fore me by the five subscri- } B. E. SMITH, C. F. SMITH,  
bers severally this 30th day } H. Y. ATTRILL,  
of June, 1880. } W. K. SOUTTER.

EDWARD STROUSE,

*Notary Public, N. Y. Co.*

On the proof of the falsity of this certificate the plaintiff recovered for his whole debt against the defendant.

It would seem that the whole stock was treated as paid by the transfer of the defendant's Attrill's property at Rockaway. So that the assets of the company consisted wholly of the property so taken.

In the New York Appeal Court, and as confirmed in the Supreme Court already noticed, it was held that the section in the Act making shareholders individually liable to the creditors to the amount of their stock, and giving an action therefor, was not a penal clause, but one arising in contract.

In this we may fully agree, but it is also open to the objection that it creates a new liability and a new right of action without which no shareholder would be directly liable to a creditor of his company.

Judgment.  
HAGARTY,  
C.J.O.

The section 21 on which this recovery was had was held penal.

I have already expressed my inability to accede to this view.

The defendant and his co-promoters applied for incorporation under this Act and accepted the corporate rights conferred wholly in the statute and fully aware of the various liabilities and obligations imposed on them by its provisions.

Their chartered rights are, as it were, conditional on their observance of its wise provisions to insure honest conduct of affairs and the protection of creditors. They know that all this protection under the chartered rights fails with their non-observance, and leaves them individually responsible for liabilities incurred by the adventure of which they are the managers and pilots.

Are not the obligations imposed on directors by an Act which they ask for, accept and act under to be considered as arising *quasi ex contractu*? The Act is assumed to be made at the instance and with the assent of the parties.

Westlake, International Law, 3rd ed., p. 273, says: "An obligation *quasi ex contractu*, like one arising from tort, is occasioned by the act of one party; but it resembles obligations by contract in that the act which occasions it is a lawful one. \* \* For example, any liability under which a husband may lie for the antenuptial debts of his wife is an obligation *quasi ex contractu*."

I only notice this point as relevant to the proposition that these defendants ask for and accept this method of constructing this company, on the clear knowledge and agreement that without its shield all debts of this partnership adventure are, but for its provisions and safeguards, to be borne by them individually as ordinary partners. Thus, gross neglect of one of its important provisions is made a withdrawal of the protection, not as imposing a

Judgment.  
HAGARTY,  
C.J.O.

penalty or express forfeiture, but simply declaring the withdrawal of the protection, and the revival of general liability.

In this view I must, with much respect, dissent both from the reasons assigned by the New York Court and the result thereof.

It may be well to refer to the dissenting judgment of two of the learned Maryland Judges delivered by Mr. Justice Stone in this case.

Our statute 12 Vic. ch. 75 (1849), allowed the formation of partnerships with one or more general partners and such others as should contribute in actual cash payments a specific sum as capital, limiting their liability to such sum. The general partners only were to transact the business and sign notes and provision was made for filing a certificate.

Section 7 provided that the partnership was not to be formed till a certificate (stating names, business, capital, &c.) should be filed, "and if any false statement be made in such certificate all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners."

Section 14 provided that any special partner transacting business, &c., for the partnership shall be deemed a general partner.

There are several decisions in our Courts on this Act : *Patterson v. Holland*, 6 Gr. 414; *S. C.*, 7 Gr. 1.

It was held that when several persons claiming to be special partners had violated the statute, they became general partners not only as to third persons, but as between themselves, and that all must contribute to losses as in an ordinary partnership. See also *Bowes v. Holland*, 14 U. C. R. 316; *Whittemore v. Macdonell*, 6 C. P. 547.

It was considered that a false statement as to the actual payment of the amount subscribed by one special partner made all the others with himself general partners. It was thought that all were bound to see that the statute was complied with.



I cannot believe that such an enactment as our 12 Vic. could be possibly held to fall within the definition of one of the "Penal Laws" of Canada.

Judgment.

HAGARTY,  
C.J.O.

To come to existing laws:—In the Companies Clauses Act of the Dominion, R. S. C., ch. 118, sec. 58 makes directors improperly paying dividends, personally liable to creditors for all debts of the company; also by sec. 79, on every written contract on which the word "Limited" is not distinctly written.

This last provision is in the Imperial Act of 1862, "The Companies Act." See Buckley on The Companies Act, 4th ed., p. 146.

Then the R. S. C., ch. 119, repeats the same provisions. See section 58.

The Ontario General Clauses Act, R. S. O. (1887), ch. 156, sec. 43, and Joint Stock Act, ch. 157, may be also referred to.

It thus appears that such provisions are familiar to English and Canadian law. We need not discuss whether an action would be maintainable here on this New York law.

*Transit in rem judicatam*, and the question is whether it is such a judgment as our Courts should enforce. I am unable to accept the argument that we must adopt the decision of the American Courts, or the view of an expert in their law, stamping on this judgment the character of a claim of such a penal nature as to fall within the rule of not enforcing the penal law of a foreign country.

I think this is a matter wholly for the Court of the country where it is sought to be enforced, with every respect for the learned Judges who hold it to be penal as between one State of the Union and another.

The question for us is whether an English Court must adopt such opinion or judge of it as a matter wholly to be governed by English law, as an English Court understands what is meant by the "penal laws of a foreign country."

I think this judgment stands outside the rule as to penal laws as we understand such enactments.

The Courts of a country calling a statute a penal law

Judgment. will govern necessarily all their own citizens in dealing with it.

HAGARTY,  
C.J.O.

If the foreign Court had declared all actions on bonds with a condition to be properly penal actions, I cannot understand on what principle an English Court must necessarily accept such a definition. To bar their jurisdiction over a person seeking to enforce any judgment, it must, I conceive, be shewn that the law of England regards the subject matter thereof as falling within its understanding of the general rule as to "penal laws," *i. e.*, such laws as by the comity of nations one country refuses to enforce in its tribunals.

BURTON, J. A. :—

If it had been our province to place an interpretation upon the statute of the State of New York on which the judgment now sought to be enforced here was recovered—in other words, if the plaintiff had rested his case on the mere production and proof of that statute, I think I should have had no hesitation in holding that it was not a penal statute within the meaning of the decisions that the penal laws of a country are of no effect beyond the limits of the State or country by which they are imposed.

The section of the New York statute does not differ in character from those to be found in some of our earlier Acts in reference to Joint Stock Companies.

The Act in force in 1859 provided that the company should annually, at a certain fixed period, publish a report stating the amount of capital stock, the proportion then actually paid in, together with the amount of the existing debts of the company, signed and sworn to in a particular manner, and then followed this provision :—

"The trustees of any company failing to comply with these requirements shall be jointly and severally individually liable for all the debts of the company then existing, and for all contracted until such report be made," and again, if the report be false in any material representa-

tion, the parties signing the same are made individually responsible in like manner.

Judgment.

BURTON,  
J.A.

I should never have thought of treating that as a penal law such as I have referred to, though penal in a sense.

The legislature, when incorporating the persons, forming what but for the incorporation would have been an ordinary partnership, had a right to say upon what terms and conditions it should be granted.

To my mind it is nothing more than this. We grant to you the privilege of limited liability, but on grounds of public policy and for the protection of persons dealing with you, we couple it with the condition that if your officials omit to comply with the requirements to make the annual report or make a false report, they shall lose this immunity from liability and be personally liable, not to a penalty, but for the debts of the company, as you and they would have been as partners, but for your charter.

Had the Act provided that for every such default, or for each and every day that the default continued, the party or parties transgressing should forfeit and pay a fixed sum to any party who should sue for the same, or to any party being a creditor, I should have unhesitatingly agreed that it was a penalty altogether local and cognizable and punishable exclusively in the country where it was created. No other State or country would have a right to take notice of it, or to enforce any judgment rendered by the tribunal having authority to hold jurisdiction within the territory where it accrued, otherwise, as has been well observed, all that would be necessary to give ubiquitous effect to a penal law would be to put it in the shape of a judgment.

But that is not the way in which this case comes before us; the parties did not satisfy themselves with proving the written law, but they produced expert testimony to prove the meaning of that law as shown by the exposition and interpretation placed upon it by the tribunals where it is in force.

In the *Baron De Bode's Case*, 8 Q. B. 208, Lord Denman

Judgment.

BURTON,  
J.A.

said in reference to such evidence, (at p. 250): "I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is, not to set forth the contents of the written law, but its effect and the state of the law resulting from it. The mere contents indeed might often mislead persons not familiar with the particular system of law." And in *Earl Nelson v. Lord Bridport*, 8 Beav. 527, the Court, after referring to the written law having been produced and proved, proceeds: "Still the words require due construction, and the construction depends on the meaning of the words to be considered with reference to other words not contained in the mere text of the law, and also with reference to the subject matter, which is not insulated from all others. The construction may have been, probably has been, the subject of judicial decision: instead of one decision, there may have been a long succession of decisions, varying, more or less, from each other, and ultimately ending in that which alone ought to be applied in the particular case."

The Courts of the State of New York have placed an interpretation upon this particular statute in which I should not have agreed, but those decisions are the law of the State of New York, and with that we are dealing.

I am of opinion therefore that on that undisputed expert testimony this is a penal statute there, and the judgment obtained upon it cannot be enforced here, and the appeal therefore should be dismissed.

OSLER, J.A. :—

The cause of action on which the judgment sued on is founded, is entirely the creature of the statute law of the State of New York, and arises out of an alleged false statement which would not, as set forth in the pleadings in the foreign suit, be recognized by our law as giving rise to any cause of action against the defendant. It is as far removed from any semblance to a contractual liability



as it is possible to conceive, and in this respect differs essentially from the liability arising under the 10th section of the Statute, which was in question in the case of *Flash v. Conn*, 109 U. S. 371.

Judgment

OSLER,  
J.A.

"It is alike contrary to principle and authority to hold that an English Court of Justice will enforce a foreign municipal law, and give a remedy in the shape of damages in respect of an act which, according to its own principles, imposes no liability upon the person from whom the damages are claimed:" *The Halley*, L. R. 2 P. C. 193, 204; *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 536-7; *Phillips v. Eyre*, L. R. 6 Q. B. 1, 28, 29.

The plaintiff therefore, in my opinion, could not have maintained, nor does he seek to maintain, an action here upon the original cause of action, but the case with which we have to deal is that of a judgment recovered in the foreign Court where the jurisdiction attached, and the principle on which our Courts give effect to such judgments appears to me to preclude the defendant from setting up as a defence merely the fact that the original cause of action was one of which our Courts would not have taken cognizance; a principle quite consistent with the view that the judgment is not with us regarded as a merger of the original cause of action. The case may be put of a tort committed in a foreign country, actionable there, but not the subject of an action if committed within our jurisdiction; or, to make the illustration closer to the present case, that for such a false statement as is the foundation of the judgment in question an action would have lain in the State of New York apart from the statute—an action in the nature, it may be said, of an action for deceit. No such action would lie in our Courts upon the original cause of action; yet if a judgment be recovered thereon in the foreign State, why should not an action be maintainable upon it here on the principle laid down in *Schibsby v. Westenholz*, L. R. 6 Q. B. 155, and other cases, namely, that "the judgment of a foreign Court of compe-

Judgment.

OSLER,  
J.A.

tent jurisdiction over the defendant imposes a duty or obligation to pay the sum for which judgment is given which the Courts of this country are bound to enforce?"

Unless, therefore, the case falls within some other controlling rule or principle or qualification applicable to a foreign law of the character of that upon which the judgment is founded, the plaintiff must be entitled to recover. It is said that this law is a penal law, and that our Courts, English and Colonial, do not give effect to the penal laws of foreign countries. The question therefore is, what is a penal law within the meaning of this proposition, a question which I think is best answered by endeavouring to ascertain what our Courts have held to be penal laws to which they would not give effect. On this point we must be guided by decisions which are binding upon us rather than by those depending upon American interstate law which may be found to depend upon principles which limit and qualify the effect to be given to foreign or State Court judgments in a manner which has not yet been laid down by English Courts of Justice. It is true that a professional witness who gave evidence as to the law of the State of New York says that having regard to what had been decided by the Court of Appeal of that State upon another Act analogous to that upon which the judgment in question is based, "he sees, as a lawyer, no reason why" the provisions of the latter should not be deemed "penal, punitive" and inflicted on the ground of public policy. Still, the question remains how far that is destructive of an action upon the judgment in our Court. Is it so because the liability is inflicted on the ground of public policy simply? I do not find authority for that. Or because it is described as penal and punitive? That leaves the question at large. In what sense are these expressions to be understood? It is, with all respect, a fallacy to say that this is a mere question of the existence, construction, or meaning, of a foreign law which is to be proved as a fact in the cause by expert testimony. The question is one of the nature and character of the law, and

that, it appears to me, must be ultimately defined and determined by the Courts of the country in which the action upon the foreign judgment is brought. They must be the judges of what is a foreign penal law in the sense in which that term is applied to a law which will, as being such, not be given effect to by them, for it can hardly be that the question whether they shall take cognizance of the action or not is to depend upon the foreign expert's view of the nature of the law on which the judgment has been recovered.

Judgment.

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OSLER,  
J. A.

We find the proposition as above stated laid down by many writers, most of whom my brother STREET has referred to, and the authorities they cite, so far as I have seen, are the cases of *Folliott v. Ogden*, 1 H. Bl. 123; *S. C.* in error, 3 T. R. 726; *Wolff v. Oxholm*, 6 M. & S. 92; *Rafael v. Verelst*, 2 W. Bl. 1055. In *Folliott v. Ogden*, the action was upon a bond, and the defendant pleaded that by a law of the State of New York the plaintiff had been attainted of the offence of adhering to the enemies of that State, and that all his estate real and personal, including the bond, had been forfeited to or vested in the people of that State. Lord Loughborough said: "It was admitted in the argument, that by the criminal sentence of attainder of one sovereign independent State, no personal disability to sue in another was created, but it was contended that the property of this bond was divested out of the plaintiff by act of the law of that country, to which both he and his property were subject. But if the penal laws of a foreign country do not in themselves import a personal disability to sue in this, neither do they by divesting the property of a person in that country, take away his right of action in England." Then the learned Chief Justice points out that, even supposing the right of the plaintiff to be gone, the action must nevertheless have been brought in his name as the law stood, a bond, as a chose in action, not being assignable at law, and continues: "I would even go further, and say, a right to recover any other specific property, such as plate, or jewels,

Judgment.

OSLER,  
J.A

in this country, would not be taken away by the criminal laws of another. The penal laws of foreign countries are strictly local, and affect nothing more than they can reach, and can be seized by virtue of their authority: a fugitive who passes hither, comes with all his transitory rights; \* \* and cannot be affected in this country, by proceedings against him in that which he has left, beyond the limits of which such proceedings do not extend."

In the same case in error Buller, J., said: "It is a general principle that the penal laws of one country cannot be taken notice of in another. \* \* This is an action on a bond, to which the defendant has pleaded that by the penal laws of another country the property of the plaintiff has been divested out of him: but this Court cannot take notice of that defence." And per Grose, J.: "It has been correctly stated by my brother Buller that the penal laws of one country cannot affect the laws and rights of citizens of another."

In *Wolff v. Oxholm*, 6 M. & S. 92, a Danish ordinance of confiscation was set up as a defence to an action for a debt. Lord Ellenborough referred to *Folliott v. Ogden*, and said: "If this ordinance is to be considered merely as a penal law, it is clear that the Courts of this country ought not to take notice of it, because no country regards the penal laws of another." And in *Rafael v. Verelst*, 2 W. Bl. 1055, De Grey, C. J., observes that crimes are in their nature local, and the jurisdiction of crimes is local.

If we speak merely of the ordinary distinction between laws as being penal or remedial, the Act in question, in its effect upon defendant, may be regarded in one sense as a penal law. But from the creditors' point of view it is remedial, intended to give them a civil remedy for the recovery of their debts. It is not like an action for a penalty, to be recovered by a prosecution of the offender at the suit of the public as in the case of *The State of Wisconsin v. The Pelican Ins. Co.*, 127 U. S. 265, or at the suit of a common informer. It is more like an action given to a party grieved, since no one but a creditor can sue, and such



an action is not considered to be a penal action: *Woodgate v. Knatchbull*, 2 T. R. at pp. 154, 155; *Bones v. Booth*, 2 W. Bl. 1226.

Judgment.

OSLER,  
J.A.

The case before us is new in its circumstances; and in the absence of any authority binding upon us, and looking at the large and unqualified effect (unqualified in this direction at least) given by recent English cases to foreign judgments, I am of opinion that the Act in question cannot be regarded as a penal law in what may be called the international sense of the term within the meaning of the cases above cited, which seems to be confined to questions of status, personal disability, confiscation of property, criminal or *quasi*-criminal sentences, and the like. It appears to me that there is nothing in these cases which suggests that a law passed for the protection of persons dealing with a corporation—a law not opposed in principle to our own ideas of public policy and just legislation—a law which gives a civil remedy only, to creditors whose rights the conduct of the company's officers may have been calculated to injure, and which is not enforceable by the State or the public—there is nothing in these cases, I say, to suggest that such a law is a penal law in the sense in which that term is used in those cases so as to disentitle the holder of a judgment recovered upon it to enforce it by action in our Courts. No decision goes so far, or suggests such a qualification.

I am therefore, with great respect to my learned brother, obliged to say that the appeal should be allowed.

I refer to Westlake's *International Law*, 3rd ed., pp. 53, 54, 370; Story on *Conflict of Laws*, 8th ed., ch. 16; Everest and Strode on *Estoppel*, ch. 5 and ch. 6, p. 160; Morawetz on *Corporations*, 2nd ed., sec. 908; *Neal v. Briggs*, 12 Ga. 104; *Dennick v. Railroad Company*, 103 U. S. 11; *First National Bank of Plymouth v. Price*, 33 Md. 487; *Attrill v. Huntington*, 70 Md. 191.

Judgment. MACLENNAN, J.A. :—

MACLENNAN,  
J.A.

I have come, after long and anxious consideration of this important case to the same conclusion as my learned brother BURTON, that the appeal should be dismissed.

I agree entirely, and for the reasons stated by him, with the conclusion of my brother OSLER, that the cause of action on which the judgment of the New York Court is founded would not be recognised by our law as creating any liability or cause of action against the respondent, and I think the enactment in question is a penal statute within the meaning of the rule that penal statutes are of no extra-territorial obligation. In my judgment the enactment is a law passed in the public interest, providing a punishment for an offence ; that is its character and purport, and I think it makes no difference that what it exacts from the offender is given to persons who are ordinary creditors of a company in payment of their respective debts. That circumstance does not alter the character of the law nor make it less punitive and penal. The law of the land obliges all persons occupying the position of a director of a company of a certain character, as a matter of public positive law, and wholly irrespective of all other considerations, to make certain returns in a prescribed manner, and provides a punishment for the neglect of that duty by what is substantially a pecuniary fine, I cannot see that the money to be paid by the delinquent is less a fine or penalty, because it is to be recovered by an ordinary action, or because it goes to satisfy an ordinary debt.

But if I were inclined to put a different construction upon the enactment, I think I should be precluded from doing so by the evidence, which is uncontradicted, that as a matter of law in the State of New York the enactment is penal and punitive, and that the liability thereby imposed is inflicted on grounds of public policy. This is stated in the clearest terms in his evidence by Mr. Tracy, who was counsel for the appellant in the original action, and who was called as a witness in this case as an expert upon

the law of the State of New York. I think in the face of his evidence we are not at liberty to put our own construction upon the enactment, or to say that he is wrong in point of law in the opinion which he has expressed as to its character.

Judgment.

MACLENNAN,  
J.A.

Coming to the conclusion then that the enactment on which the judgment is founded is penal in its character, it is clear law that no original action could be brought upon it in the Courts of this Province; and the further question is whether it makes any difference that the present action is not founded upon the statute itself but upon a judgment obtained upon it in the foreign state.

The cases of *Godard v. Gray*, L. R. 6 Q.B. 139, and *Schibbsby v. Westenholz*, L. R. 6 Q. B. 155, decide that a foreign judgment is not merely evidence of a debt, but that it is an independent cause of action, and the principle stated by Parke, B., in *Russell v. Smyth*, 9 M. & W. at p. 819, and in *Russell v. Jones*, 13 M. & W. at p. 633, is approved, that the judgment imposes a duty or obligation on the defendant to pay the sum for which the judgment is given, which the Courts in this country are bound to enforce, and consequently that anything that negatives that duty or forms a legal excuse for not performing it, is a defence to the action. In his judgment in *Godard v. Gray*, at p. 150, Lord Blackburn says that the judgment gives rise, *at least primâ facie*, to a legal obligation to obey it and pay the sum adjudged. Upon these authorities it must be admitted that the appellant is entitled to succeed unless the fact that the judgment is for a penalty is a defence.

There seems to be no express authority on the very point in England or in our own country; but I humbly think the only proper conclusion is, that such a defence is good.

If a foreign judgment is only *primâ facie* a cause of action, it would seem to follow that if the obligation which the judgment was obtained to enforce, is not recognized abroad, no more should the judgment; for the judgment

Judgment. is merely an instrument or proceeding for the enforcement  
MACLENNAN, of the original obligation, and if our Court should give  
J.A. judgment for the plaintiff, it would be lending itself to the enforcement of a foreign penalty against the defendant. To use the language of Gray, J., in delivering the judgment of the Supreme Court of the United States, in *The State of Wisconsin v. Pelican Ins. Co.*, 127 U. S., at p. 292: "The essential nature and real foundation of a cause of action are not changed by recovering a judgment upon it; and the technical rules, which regard the original claim as merged in the judgment, and the judgment as implying a promise by the defendant to pay it, do not preclude a Court, to which a judgment is presented for affirmative action, (while it cannot go behind the judgment for the purpose of examining into the validity of the claim) from ascertaining whether the claim is really one of such a nature that the Court is authorized to enforce it."

In another passage of his judgment, he says, referring to Wharton's Conflict of Laws, sec. 833: "The rule that the Courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanours, but to all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue, or other municipal laws, and to all judgments for such penalties. If this were not so, all that would be necessary to give ubiquitous effect to a penal law would be to put the claim for a penalty into the shape of a judgment."

I think these reasons for holding that the judgment ought no more to be enforced by our Courts than the original cause of action, to be unanswerable, and agreeing as I do with the very elaborate judgment of my brother STREET, it is my opinion that the appeal should be dismissed.

*The Court being divided in opinion the appeal  
was dismissed with costs.*



## GIBBONS V. McDONALD.

*Assignments and preferences—Bankruptcy and Insolvency—R. S. O. (1887)  
ch. 124, sec. 2.*

A security for a pre-existing debt taken in good faith when the debtor is in insolvent circumstances, cannot be impeached where it is given in consequence of pressure by the creditor or where an intent on the part of the debtor to give a voluntary preference is otherwise rebutted.

*Molsons Bank v. Halter*, in the Supreme Court, not yet reported, followed. S. C., 16 A. R. 323, and *Johnson v. Hope*, 17 A. R. 10, considered.

THIS was an appeal by the plaintiff from the judgment Statement. of STREET, J., reported 19 O. R. 290.

The plaintiff was assignee for the benefit of creditors of one Andrew Morrison under an assignment made, pursuant to R. S. O., (1887), ch. 124, on the 12th of December, 1889, and brought this action to set aside as a preference a mortgage of a farm made by Morrison to the defendant McDonald, on the 9th of November, 1889, to secure a debt of \$600 then due. Before action brought the defendant McDonald had assigned the mortgage to the defendant Heffernan, and the plaintiff claimed, in the alternative, payment by McDonald to him of the proceeds of the assignment.

The action was tried before STREET, J., who, against his own view of the construction of the Act, felt himself constrained by *Johnson v. Hope*, 17 A. R. 10, to dismiss the action on the ground that the mortgagee had no knowledge of the insolvent condition of the mortgagor at the time he obtained the mortgage. That the mortgagor was in fact insolvent at the time and that the mortgagee obtained a preference was clearly proven, but it was also shewn that the mortgage was given in consequence of a *bonâ fide* demand for security.

The plaintiff appealed and the appeal came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A.], on the 23rd and 24th of September, 1890.

Argument.

*Moss*, Q.C., and *Hays*, for the appellant. The learned Judge gave to the decision in *Johnson v. Hope*, 17 A. R. 10, a much greater effect than should be given. It is true that the language used in that case is very wide but the security there attacked was given to secure an actual advance and the wide language must be limited to transactions of the kind there in question. In the case at bar the security was taken to secure an antecedent debt and, having clearly the effect of giving the mortgagee a preference over the other creditors of the admittedly insolvent debtor, is void: *Molsons' Bank v. Halter*, 16 A. R. 323; *River Stave Co. v. Sill*, 12 O. R. 557. If *Johnson v. Hope*, 17 A. R. 10, applies at all to the case of security for an antecedent debt, it does not at all events govern this case, because knowledge of the insolvent condition of the debtor is brought home to the mortgagee, and the mortgage and assignment thereof must be set aside or the mortgagee ordered to pay to the assignee the moneys received from Heffernan.

*Lash*, Q. C., for the respondent, McDonald. This mortgage was taken by the creditor in good faith and without knowledge of the debtor's insolvent condition and cannot be impeached. Fraudulent intent to prefer must still be shown: *Johnson v. Hope*, 17 A. R. 10; *Molsons' Bank v. Halter*, 16 A. R. 323; *Lamb v. Young*, 19 O. R. 104; *Burns v. McKay*, 10 O. R. 167.

*J. P. Mabee*, for the respondent, Heffernan. Heffernan is a purchaser for value without notice, and is protected: R. S. O. (1887) ch. 124, sec. 8; *Robertson v. Holland*, 16 O. R. 532.

*Moss*, Q. C., in reply.

January 13th, 1891. HAGARTY, C. J. O:—

The only point to be decided here is, whether the absence of notice or knowledge of the mortgagor's insolvency at the time of taking the security, can support it against the second section of the Assignments Act. The learned Judge

thought himself bound by his understanding of the judgment of this Court in *Johnson v. Hope*, 17 A. R. 10, to uphold the security contrary to his own view of the law.

Judgment.  
HAGARTY,  
C.J.O.

I think that *Johnson v. Hope*, was rightly decided on its facts, under the third section of the statute, there being a present advance of money.

But the language used by my learned brother who pronounced the judgment of this Court, was, though intended to be wholly based on the facts in evidence, capable of a wide application, and appears to have been accepted as our unanimous opinion that want of notice of the insolvent state of the mortgagor protected a security taken for a pre-existing debt, although the effect was clearly to give a preference, the assignment in insolvency following almost immediately thereafter.

Speaking for myself, I can say emphatically that when concurring in the judgment in *Johnson v. Hope*, I was not adopting any such view of the law. I was only regarding the facts in evidence.

*Ashley v. Brown*, 17 A. R. 500, was also rightly decided on its facts; this was an interpleader suit. The purchase of the goods in question was for money, and the execution creditor was not a creditor of the insolvent at the time of the purchase, but became such by a judgment in an action for *crim. con.* not commenced until after the defendant's purchase.

I am not aware that I have ever had to consider the question under the last Act, as to the effect of want of knowledge of insolvency of the vendor or mortgagor on the part of the vendee or mortgagee, and as I have already stated I did not consider that the cases of *Johnson v. Hope* and *Ashley v. Brown*, called for a decision of such a point.

The late decision of the majority of the Supreme Court in *Molsons Bank v. Halter*, (not yet reported) seems to render it unnecessary to make the existence or non-existence of such knowledge to be alone sufficient to decide this case.

It is laid down that the words "or which has such effect"

Judgment.

HAGARTY,  
C.J.O.

are confined to the last clause in section 2 as to giving a creditor a preference over his other creditors, and that they may be considered as redundant words, inserted, as it were, *ex abundanti cautela*, and that they do not "have the effect of changing the nature of the enquiry which would have been necessary, or of extending the operation of the section beyond what it would have effected, if these words had been omitted."

As we understand the judgment of the learned Judges of the Supreme Court, Mr. Justice Strong, and Mr. Justice Gwynne, when a creditor obtains from a debtor on his urgency, or desire for security, security for his debt, the mere fact of the latter being in fact insolvent at the time, and shortly afterwards, going into insolvency, does not, in the absence of any collusion or guilty knowledge on the creditor's part, defeat the transaction at the suit of the assignee or the creditors. It must be the illegal intent to defeat, delay, or prejudice the creditors, or to give a preference to one over the others, that brings the case within the statute.

Mr. Justice Strong cites approvingly Lord Cairns' language in *Butcher v. Stead*, L. R. 7 H. L. 839: "'Preference' imports a voluntary preference, that is to say, a spontaneous act of the debtor."

Mr. Justice Gwynne says: "To constitute a preference, it must have been given by an insolvent of his own mere motion, and as a favour or bounty proceeding voluntarily from himself." And again: "As the 48 Vic., ch. 26, makes no difference as to the character of the act which constitutes a preference, but uses that term in its well known legal sense, a disposition of property by an insolvent which did not, before the Act, constitute a preference of one creditor over others, cannot be adjudged to be a preference within the meaning of 48 Vic."

Mr. Justice Strong says: "Pressure by the creditor in the case of a common debt divests a transfer or security of any fraudulent colour."

The judgments of these learned Judges, as also that of



the dissentient, Mr. Justice Patterson, are very full and clear.

Judgment.

HAGARTY,  
C.J.O.

We must accept the law as declared by the majority of our Appellate Court, without reference to any views or opinions of our own.

In the case before us, the security was obtained by the creditor without any knowledge of his debtor's insolvent state; and there is nothing in the evidence to suggest any bad faith or collusion between him and his debtor.

The learned trial Judge thought that the debtor must have known that by giving this mortgage he was in effect giving this defendant a preference. I think it very doubtful if the debtor had such an idea. I would rather have supposed that he thought by staving off this claim (as he swears) he would have had sufficient time to settle his affairs and pay his creditors.

But there is no evidence from which we could safely find either that the alleged preference was his voluntary act or emanating from him; or that he did it with the evil intent stated in the statute, as it is now expounded for our guidance.

BURTON, J.A.:—

The learned Judge places his decision solely on the ground that giving the mortgage which is impeached had the effect of giving the defendant Macdonald a preference over his other creditors, and he finds expressly that there was nothing in the evidence to shew that the defendant was aware of the insolvency of the debtor.

From my remarks in *Kennedy v. Freeman*, 15 A. R. at p. 223, it will be seen that I have always been of opinion that the words "or which have such effect" added little or nothing to the Act, and that unless it was shewn that there was a concurrence of intent on the one side to give and on the other to accept a preference over other creditors with a knowledge of the debtor's insolvency, the transaction could not be impeached merely because it had the effect of giving a preference.

Judgment.

BURTON,  
J.A.

That view of the Act seems to be taken by Strong, and Gwynne, JJ., in the Supreme Court, in the recent case of *Molsons' Bank v. Halter*, and if I am right in assuming that Mr. Justice Taschereau fully concurred in those judgments, and not merely in the result, then the question is concluded so far as this Court is concerned by the judgment of that tribunal; but however that may be I see no reason for departing from the judgment I then formed, supported as it is by the forcible reasons for that construction to be found in the opinions of Mr. Justice Strong and Mr. Justice Gwynne.

I am of opinion, therefore, that the appeal should be dismissed.

OSLER, J. A. :—

The recent judgment of the Supreme Court in *Molsons' Bank v. Halter*, affirming the decision of the majority of this Court in that case, renders it unnecessary to devote much time to the examination of the questions raised on this appeal, even if they were not concluded, as, speaking for myself, I think they are, by our decision in *Johnson v. Hope*, 17 A. R. 10. It is enough to say that the plaintiff not only fails to prove knowledge, if that can now be material, on the part of Macdonald of Morrison's insolvency; (see *Burns v. McKay*, 10 O. R., 167, affirmed in appeal) but also fails to shew the intent on Morrison's part to give the mortgage by way of preferring his creditor Macdonald to his other creditors. Macdonald had demanded payment or security for his debt, and this was sufficient to rebut the wrongful intent. That intent as I understand the judgments of Strong, and Gwynne, JJ., concurred in by Taschereau, J., is as essential under the present Act as it was under the former, to invalidate a security given to the honest creditor. I had occasion to examine the law as it formerly stood, and to cite the authorities, to which I may add *In re Boyd*, 15 L. R. Ir. 321, (1885), in the case of *Slater v. Oliver*, 7 O. R. 158, which I refer to as

stating my own view of the result of the cases, including that of *Butcher v. Stead*, L. R. 7 H. L. 839; 25 W. R. 463; 33 L. T. N. S. 541, as applied to the Act before it was, as I thought, amended by the 48 Vic. ch. 26. My view of the latter Act, which I believe coincides with that of every member of the High Court Bench who has had occasion to consider it, is stated in *Kennedy v. Freeman*, 15 A. R. 216, and in *Molsons' Bank v. Halter*, 16 A. R. 323.

Judgment.

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OSLER,  
J.A.

I was at liberty to state it again in the latter case, there having at that time been no decision of this Court upon the subject. But the case of *Johnson v. Hope*, 17 A. R. 10, which the learned Judge below refers to as constraining him to decide in favour of the plaintiff contrary to his own view, I regard as the legitimate descendant of the judgment of the majority of the Court in *Molsons' Bank v. Halter*. As I there said, (p. 333): "If that be not the meaning of the Act," *i. e.*, that any transfer by an insolvent, if the effect of it is to prefer the creditor, whatever may have been the intent with which it was given, shall be avoided, "the doctrine of preference (I think I must have written pressure), which the Legislature has been struggling to abolish remains in full force, and the wrongful intent may be rebutted just as hitherto." Of *Johnson v. Hope*, I need only add that the decision of the majority of the Supreme Court goes far beyond anything that is necessary to support it. That decision, which I do not presume to criticize, though I may say with all respect, there being so many judicial opinions opposed to it, that it does not convince me, is a remarkable illustration of the difficulty in which the Legislature not unfrequently finds itself in endeavouring to uproot a fixed judicial view. That it has tried to change the law, no one who knows anything of the course of legislation and the demands of the mercantile community in this Province can doubt. It seems, however, to have failed to express itself intelligibly since the result of all its efforts is nil.

The plaintiff's appeal must, therefore, be dismissed as against both the defendants. The defendant Heffernan,

Judgment.

OSLER,  
J.A.

to whom the defendant Macdonald had assigned the mortgage, asked that the latter should be ordered to indemnify him. I hardly see why he should have been made a party, but at all events he needs no indemnity. The plaintiff has failed to attack his mortgage successfully. His co-defendant's covenant is not broken, and the action and appeal must be dismissed as against both of them with costs.

MACLENNAN, J. A. :—

I adhere in its entirety to the language used by me in *Johnson v. Hope*, 17 A. R. 10, and this appeal must, therefore, in my opinion be dismissed.

*Appeal dismissed with costs.*

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## RADFORD V. MACDONALD.

*Evidence—Executor and administrator—Corroboration—R. S. O. (1887)  
ch. 61, sec. 10.*

To enable an opposite or interested party to recover in an action against the estate of a deceased person it is sufficient if his evidence is corroborated, *i. e.*, strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.

*Parker v. Parker*, 32 C. P. 113, approved.

The production by the plaintiff, an architect claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's hand-writing showing the rooms and the accommodation required and the suggested cost, and of a sketch of the property :—

*Held*, (BURTON, J.A., dissenting) sufficient corroboration of the plaintiff's evidence.

Judgment of the County Court of York affirmed.

THIS was an appeal by the defendant from the judgment of the County Court of York. Statement.

The plaintiff was an architect and brought this action to recover from the defendant, as executrix of George Macdonald, deceased, the sum of \$120 as commission for the preparation of plans and estimates for a dwelling-house to cost \$12,000, under a contract made with him, as he alleged, by the deceased in his life-time.

The making of the contract was sworn to by the plaintiff, and the only question was whether his evidence was sufficiently corroborated to justify a recovery. In corroboration, two documents were produced, both of which were proved or admitted to be almost wholly in the hand-writing of the deceased. One was a list of rooms with the heading "Limit, all extras, \$12,000." The other was a sketch showing certain streets and the location and dimensions of a lot with the words "G. Macdonald's lot" written on it, and it was proved that the deceased did own such a lot.

MACDOUGALL, Co.J., gave judgment for the plaintiff, and the defendant appealed, the appeal coming on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 19th of September, 1890.

Judgment.      *George Bell*, for the appellant.  
HAGARTY,      *P. H. Drayton*, for the respondent.  
C.J.O.

January 13th, 1891.      HAGARTY, C. J. O.:—

I am of opinion that on the authorities the evidence in this case was sufficiently corroborated to support a verdict from a jury that the plaintiff's proof of his claim was true.

It has been well put by more than one of our own judges that evidence that strengthened the probability of the plaintiff's evidence being true, was corroborative evidence: *Costello v. Hunter*, 12 O. R. 333.

The evidence so offered must be not inconsistent but consistent with the plaintiff's claim.

As Lindley, L. J., says in *In re Finch, Finch v. Finch*, 23 Ch. D. at p. 277: "Evidence that is consistent with two views does not seem to me to be corroborative of either." Sir Geo. Jessel, says, at p. 274: "As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material."

The distinction here pointed out explains such decisions as *Burn v. Burn*, 8 O. R. 237, and *Tucker v. McMahon*, 11 O. R. 718.

Armour, C. J., in *Parker v. Parker*, 32 C. P. 113, reviews the authorities. He quotes from *Sugden v. Lord St. Leonards*, 1 P. D. 154, Sir James Hannen's explanation of what is corroboration: "It is sufficient if I find that independent support is given to Miss Sugden's statements in so many instances that it raises in my mind the conviction that she is to be depended on even in those matters in which I do not find corroboration elsewhere."

Armour, C. J., states his own view, in which I agree: "If there is any evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular, it must be submitted to the jury as sufficient corroboration in point of law, the

weight to be attached to it in point of fact being a matter Judgment.  
for their consideration."

HAGARTY,  
C.J.O.

He also cites *Willcox v. Godfrey*, 26 L. T. N. S. 328. and 421; *Hickey v. Champion*, 20 W. R. 752; *Cole v. Manning*, 2 Q. B. D. 611; *Regina v. Bannerman*, 43 U. C. R. 547.

In *Cole v. Manning*, 2 Q. B. D. 611, the learned Judges considered the evidence adduced in a bastardy case to be sufficient, where, in my judgment, the corroboration was far weaker than in the case before us.

The statute seems undistinguishable from ours in its purport. Lord Field (then in the Queen's Bench) says: "Suppose the appellant and the respondent had been seen walking together in a lonely spot, such as might be convenient for the commission of immoral acts: certainly that would be a material corroboration of the appellant's evidence as to the paternity of her illegitimate child." I refer to his judgment, and that of Mellor, J., for a more full statement of the evidence held to be admissible as corroborative.

The remarks of the Judges, Bramwell, and Martin, BB., in *Willcox v. Godfrey*, 26 L. T. N. S. 328, a breach of promise case, at the trial and afterwards in term, are very much in point.

I am of opinion that there was quite sufficient corroboratory evidence offered in the case before us to warrant the submitting of the truth of the plaintiff's statement to the jury or judge. The production by the plaintiff, an architect claiming payment for his services in drawing plans and estimates for a residence which the testator was intending to erect on a specified parcel of land, of the document in deceased's writing of the cost and a catalogue of all the rooms and accommodation required, together with the sketch of the ground partly in the same hand-writing was, I think, corroboratory evidence fully warranting the learned Judge in accepting the statement of the plaintiff as true, and finding in his favour.

Judgment. OSLER, J. A. :—

OSLER,  
J.A.

What the statute [R.S.O. (1887) ch. 61, sec. 10] says is that in any action by or against the heirs, executors, administrators or assigns of a deceased person, an opposite or interested party shall not obtain judgment on his own evidence in respect of any matter occurring before the death of such deceased person, unless such evidence is corroborated by some other material evidence.

Some independent material evidence therefore must be given, which corroborates, in plain Anglo-Saxon, strengthens, the evidence of the opposite or interested party. If the evidence offered is admissible, if it supports the evidence of the party, it is corroborative evidence, and it is then for the judge or jury to say what weight is to be attached to it.

In *Bessela v. Stern*, 2 C. P. D. 265, the words of the Act in question were: "Unless his or her testimony shall be corroborated by some other material evidence in support of such promise," *i. e.*, promise of marriage. Grove, J., said: "If the words of the Act had been, like those of the Bastardy Act, 'corroborated in some material particular by other testimony,' then the case would have been brought within the words of the statute, because any evidence which must be left to the jury would fall within that description." On appeal the evidence offered was held to be sufficient to go to the jury, Cockburn, C. J., saying: "The evidence given in corroboration need not go the length of establishing the contract. If the evidence support the promise it is enough." This is a much more liberal rule than that which seems to have prevailed in the Ecclesiastical Courts, at least as laid down in *Simmons v. Simmons*, 11 Jur. 830; 1 Rob. Ecc. R. 566, where it was held by Dr. Lushington that the testimony of one witness only, a *particeps criminis*, was insufficient, unless aided by corroborative evidence, to establish the charge of adultery; and he laid it down that corroborative evidence is evidence not merely showing that the account



given is *probable*, but proving facts *ejusdem generis* and tending to produce the same result. This view, however, seems to have been based upon a rule which made two witnesses necessary in such cases, for the learned Judge says: "Where there is no rule as to the number of witnesses required, evidence as to probability may have great weight and be justly considered in forming a conclusion; but when two witnesses are required by law, either together to one overt act, or separately to two overt acts, I conceive that evidence to mere probability, not applying to the act itself, and which evidence may be true or false, without affecting the act, cannot be received as corroborative. \* \* Unless this distinction be adhered to, the rule of two witnesses must vanish into thin air." And see *Kenrick v. Kenrick*, 4 Hagg. 114.

Judgment.

OSLER,  
J.A.

The common law rule is: "The testimony of a single witness, relevant for proof of the issue in the judgment of the judge, and credible in that of the jury, is a sufficient basis for decision both in civil and criminal cases." That is now varied in actions like the present by the condition that if the single witness be the party himself, his evidence must be corroborated by some other material evidence. Then the question arises in what degree, or to what extent? It has long been conceded that it need not be corroborated in every particular. Had that been the intention of the Act, it would have been simpler to enact that the party in such case should not be a competent witness, since the evidence required in corroboration would alone be sufficient. Nor is the corroboration required to be directed to any particular fact, or part of the evidence. It is the *evidence* of the party which is to be corroborated by some *other material evidence*. If then the evidence in corroboration is not required either to prove the contract itself or any particular fact deposed to by the party, the only test or formula which can be applied to it is that it must be relevant and material and calculated to lead to the belief that the evidence of the party is credible. The language of our Act is more general than that of either of the Acts

Judgment.

OSLER,  
J.A.

referred to in *Bessela v. Stern*, though it may be fairly said to be equivalent to that used in the Bastardy Act. That case, therefore, to the fullest extent, whether we take the judgments in the Divisional Court or those in the Court of Appeal, supports the plaintiff's contention here if the evidence offered was relevant and material.

The question then being whether the deceased had given instructions to the plaintiff, who is an architect, to prepare plans, &c., for a house which he intended to erect in the Queen's Park, the plaintiff gave his own evidence in support of his claim for work done in the preparation of such plans, speaking of verbal instructions received from and interviews with the deceased on the subject. Had there been nothing more, the action must have failed since the evidence would have remained uncorroborated. But he produced two papers which he had received from deceased; one a rough sketch or plan of lots in the park, with the deceased's lot marked thereon with his name; the other, a memorandum commencing "Limit all extras \$12,000," and containing a list of rooms for a dwelling-house. These were proved to be in the deceased's handwriting, and they are found, without any sinister imputation, in the possession of the plaintiff. How came they there, and for what purpose should they be there? Beyond any question they were not less admissible as evidence in the action against the executor, than they would have been in a similar action against the deceased had he survived. They were evidence relevant to the issue; evidence which could not have been withdrawn from the jury; evidence which, to use the language of Mellor, J., in *Cole v. Manning*, 2 Q. B. D. 611, a case under the Bastardy Act, shews at least a probability that the statement of the plaintiff is true. It may not be very strong evidence—that is not what the Act insists upon,—but it is more than a mere scintilla, it is material evidence, it is independent evidence, and I think it is corroborative evidence within the meaning of this statute.

MACLENNAN, J.A. :—

Judgment.

MACLENNAN,  
J.A.

I agree wholly in the judgment of the learned Chief Justice, and I think the law on the subject is expressed with force and clearness by Armour, C. J., in the citation from his judgment in *Parker v. Parker*, 32 C. P. 113.

I think, in such cases, the first question is, is the evidence admissible? and the further question, does it strengthen the evidence given by the party adducing it? If these two questions are answered in the affirmative, I think the evidence answers the requirement of the statute, provided the judge, or the jury, as the case may be, believe it.

“Corroborate” means to strengthen, to give additional strength to, to make more certain, and if the evidence helps the judicial mind appreciably to believe one or more of the material statements or facts deposed to by the party, then, I think, it is what is required by the statute.

In such cases, the weight of the evidence will vary, but its admissibility cannot depend on its weight. In some cases it may be weak and in others strong, but the Legislature has not said that it must be strong, but merely that it must be sufficient to corroborate, that is, to strengthen, the evidence of the party.

I think that in the present case it is impossible to say that the evidence of the plaintiff, of his having been employed by the deceased to do the work for which he seeks payment, is not considerably strengthened by the production by him of the two papers referred to, a great part of which is proved, by independent testimony, to be in the hand-writing of the deceased.

I agree that the judgment is right, and that the appeal should be dismissed.

BURTON, J.A. :—

This is an appeal from the County Court of York, and the only point in the case is whether there was any corroborative evidence proper to submit to a jury. If there

Judgment.

BURTON,  
J.A.

was, although I should have come to a different conclusion from the learned Judge upon the facts, I should not think of interfering with his conclusion in that respect.

It is therefore a pure question of law which we are called upon to decide.

In the case of an accomplice in a criminal case, he is a competent witness and there is no statutory enactment requiring him to be corroborated, but in practice it has been deemed so necessary to require his testimony to be corroborated *in some material part* by unimpeachable evidence, that the practice as it has been said "deserves all the reverence of law" and is universally acted upon. It is true that the confirmation need not extend to every part of the accomplice's evidence, for there would be no necessity to use him at all as a witness if his narrative could be completely proved by other evidence free from suspicion.

In some of the cases decided even within the present century, prisoners have been convicted and executed on the evidence of an accomplice who was confirmed as to the *corpus delicti* and to others of the party, but not as to those executed, but in such a case at the present day the jury would be directed to acquit those not touched by this confirmatory evidence. "A man" said Lord Abinger, in one case, *Regina v. Farler*, 8 C. & P. at p. 108, "who has been guilty of a crime himself will always be able to relate the facts of the case, and if the confirmation be only on the truth of that history, without identifying the persons, that is really no corroboration at all."

And as I now understand the authorities in recent times it is not sufficient to corroborate an accomplice as to the facts of the case generally, but he must be corroborated as to some material fact or facts which go to prove that the prisoner was connected with the crime charged.

The following extract from the remarks of Williams, J., conveys the view upon which I have always acted in cases of that description at the Assizes, and appears to be much more consistent with reason than some of the earlier de-



cisions although having the sanction of such eminent Judges as Lord Ellenborough, Bayley, and Lord Denman. "You must," said Mr. Justice Williams, "shew something that goes to bring home the matter to the prisoners. Proving by other witnesses that the robbery was committed in the way described by the accomplice, is not such confirmation as will entitle his evidence to credit so as to affect other persons. Indeed I think it is really no confirmation at all, as every one will give credit to a man who avows himself a principal felon for at least knowing how the felony was committed. It has always been my opinion that confirmation of this kind is of no use whatsoever."

Judgment.

BURTON,  
J.A.

The corroboration ought to be of some facts or fact, the truth or falsehood of which go to prove or disprove the offence charged against the prisoner. See *Rex v. Addis*, 6 C. & P. 388.

It is, I think, an error to assume that because a number of circumstances sworn to by the accomplice are shown by independent witnesses to be true, that furnishes any reason whatever for relying upon his evidence as true unless the facts confirmed tend to prove the offence and the connection of the accused with it.

I may be told that these are criminal cases, and a great difference exists between such cases and one like the present. Let us see what the difference is. In the one case the law regards the accomplice as a competent witness, upon whose evidence an accused person may be convicted, but having regard to the unsatisfactory nature of the evidence of persons so placed, the Courts have told juries that as reasonable persons they ought not to credit that evidence unless corroborated, not as to the facts generally, or some of these facts, but as to some material fact which goes to prove that the accused was connected with the crime charged.

In the case before us, the plaintiff would have been a competent witness upon whose evidence alone a recovery could have been had, but the Legislature, looking at the danger of allowing a party to recover upon his unsup-

Judgment.

BURTON,  
J.A.

ported testimony where the other party to the suit is dead, has declared that he shall not recover on his own evidence in respect of any matter occurring before the death of the deceased person, unless such evidence is corroborated by some other *material* evidence. Surely the materiality of that evidence to prove the cause of action itself must be as necessary in the cases in which the Legislature has interfered to prevent a recovery as in cases where the Court alone has interposed to prevent a possible injustice; and it is not sufficient to produce evidence to corroborate the facts generally sworn to by the plaintiff, and thereby show that he is a witness entitled to credit, unless the corroboration extends to those facts, or some of them, which are material to establish the plaintiff's right to recover.

I have examined the authorities in England with great care, and I think I am safe in saying that no recent case can be found where evidence was regarded as corroborative unless it went distinctly the length of establishing some fact connected with that which the plaintiff was bound to establish to enable him to recover.

I think the learned Chief Justice Armour laid down the true rule in *Tucker v. McMahon*, 11 O. R. 718, where the point to be established was that the relationship between the plaintiff and the testator had been changed from that of being a member of his family to that of a hired servant. There she swore to that state of things, and in confirmation her son swore that the testator had said she shall be handsomely paid for what she does for me, and another witness, that he would pay well for her services, and the learned Judge held that this was insufficient, as in order to satisfy the statute the corroborative evidence must be such as would tend to prove what she testified to as being the ground of her claim.

The evidence was consistent with the view that she continued to live with the testator in precisely the same relation as she had done at first, and not as a hired servant.

The statements were indicative of an intention on his part to pay the plaintiff, but they afforded no evidence of

the motive, and were quite as consistent with an intention moved by moral obligation as with one moved by legal obligation.

Judgment.

BURTON,  
J. A.

The late Chief Justice Cameron does indeed say in a case (in which however the Court held that corroboration was not necessary), "that corroboration was only necessary in such matters as will tend to strengthen the probability of the truth of the evidence of the witness whose evidence requires corroboration."

This, I think, is not the law and the case relied upon does not, I think, support it. That case was *Regina v. Boyes*, where the offence charged was not of a very serious character and where there was a doubt whether the witness spoken of as an accomplice could be properly considered as such. The Court seems to have thought that it was a case in which the Judge who tried the case might in his discretion have thought it safe to convict *without corroborative evidence*, but they held that in the particular case there was corroborative evidence although the report does not show what that evidence was.

But the learned Chief Justice in another case, *Regina v. Bannerman*, 43 U. C. R. 547, uses language which qualifies to a very great extent the dictum attributed to him in the case I have referred to where he says: "Here the statute prohibits in positive terms the conviction of the prisoner unless the evidence, and not merely some material particular, shall be corroborated, and, as I have already said, the material point here requiring corroboration is that the name of the prosecutor to the note was not written by the defendant on an authorized occasion."

In *Costello v. Hunter*, 12 O.R., 333, the same learned Judge, in dealing with a statute requiring corroborative evidence in support of a promise of marriage, says: "If this question was now presented for the first time, I should have been disposed to interpret the statute as requiring some evidence that would have direct reference to the promise, and not the mere presentation of circumstances that would be quite as consistent with the non-existence of a promise

Judgment.  
BURTON,  
J.A.

as with its having been made;" and after stating the inclination of his opinion, intimated that he had not sufficient confidence in it to warrant his holding that the learned Judge was wrong, and he afterwards refers to the case of *Bessela v. Stern*, 2 C. P. D. 265, the decision of which in appeal, he says, confirms his own view of what the corroborative evidence should be.

In that view, I entirely agree. The case is a very strong one to show that the evidence must be such as, although not sufficient to prove the contract, confirmatory of some part of it.

There the plaintiff proved a promise; the witness overheard the plaintiff say to the defendant: "You always promised to marry me, and you don't keep your word;" to which the defendant made no answer, and the jury were at liberty to infer that he admitted the promise.

If a statement, it was said, was made in the course of conversation to the disadvantage of another, and the latter does not deny it, there is evidence of admission that the statement is correct.

To enable the plaintiff to recover she had to establish a mutual promise of marriage—that she did establish by her own evidence—it was not necessary to give corroborative evidence going to that extent, but it was necessary to give corroborative evidence to confirm it, and that was done by giving evidence of his admitting that he had made a promise. All the Court were of opinion that the inference drawn by the jury was not the correct one; but there was evidence such as is every day received of an admission which went to corroborate the plaintiff's evidence of a sufficient promise.

I do not think that the bastardy case, *Cole v. Manning*, 2 Q. B. D. 611, which has been referred to, at all conflicts with this view—the fact to be established there was that the defendant was the father of the child, the evidence of the mother requiring to be corroborated in some material particular to the satisfaction of the justices.

There was no evidence to corroborate the appellant's



Judgment.

BURTON,  
J.A.

evidence of the parties being together at the time she swore that the connection had taken place, but it was proved to the magistrate's entire satisfaction that during the previous summer the parents of the appellant, with whom previously to that date the respondent had been on terms of great friendship and intimacy, refused him the house and quarrelled with him owing to their suspicions with regard to his conduct towards the appellant; that they had surprised the appellant and respondent together on more than one occasion; that the door of the parlour where they were was closed for a minute or two against them; that the appellant sat on the knee of the respondent; and other circumstances of a similar nature which would have had great effect on the magistrate's mind had they occurred at or about the time when the child might have been begotten.

The Court held, as I think I should have held, that the evidence was properly receivable in point of law in corroboration of the main charge.

*Hodges v. Bennett*, 5 H. & N. 625, decides merely that under the Act there in question it was not necessary to corroborate the mother's testimony as to the payment of money, but it is of importance only as establishing that there must be corroborative evidence on the main point, which was there the paternity of the child.

In *Regina v. Read*, 9 A. & E. 619, the question arose on the sufficiency of a bastardy order which omitted to show that the corroboration was "in some material particular" and it was quashed on that ground. Mr. Justice Coleridge in the course of the argument says: "Suppose evidence had been offered, impugning the character of the mother, would evidence in answer to that come within the clause? Must not the corroboration refer to some 'material particular' of her story?"

In the case of *In re Finch*, *Finch v. Finch*, 23 Ch. D. 267, the Court dwell upon the importance, even where there is no statute requiring it, of not giving any weight to the testimony of the claimant unless that testimony is corrobor-

Judgment.  
 BURTON,  
 J.A.

ated, and Sir George Jessel, in his usual forcible style, thus refers to corroboration. "As I understand, corroboration is some testimony proving a material point in the testimony which is to be corroborated. It must not be testimony corroborating something else—something not material. \* \* The lady," he proceeds, "says her husband gave her a bust or some plate. There is no direct evidence of the gift except this lady's own testimony."

This was attempted to be corroborated by showing that the property was found in a house which was her separate property, but whatever might have been the effect of such evidence if the husband and wife had been living apart, it amounted to nothing where it was shown that that was not the case.

Now in England they have no such statute as we have here, and the rule there was one of mere practice, and not of strict law, and upon this point see the recent decision *In re Dillon, Duffin v. Duffin*, 44 Ch.D. 76. Here, however, the Legislature has said there shall be no recovery upon the plaintiff's unsupported testimony, with the view, no doubt, of protecting a dead man's estate from unfounded claims.

I think, therefore, it will be found that in England all of the recent decisions agree that the corroboration required in a case like the present is of some evidence tending to prove the cause of action or defence, and not other general facts, although proved to be true by independent testimony, nor of facts which, though consistent with the material facts sought to be proved, are quite consistent with another view, and although there has been some difference of opinion in the Courts of this country the weight of authority is here also in favour of that view.

The cases were discussed and reviewed by Chief Justice Armour in the case of *Parker v. Parker*, 32 C. P. 113, in which he refers to the language of Chief Justice Draper in the early case of *Orr v. Orr*, 21 Gr. 397.

The recent decision *In re Dillon, Duffin v. Duffin*, 44 Ch. D. 76, confirms the view that the learned Chief Justice was mistaken in supposing that the Act was mere-

ly declaratory of the common law; the Act means I think precisely what it says, that there shall be no recovery unless the party's evidence is supported in a material particular, whereas at common law there could be such a recovery, but it is clear that that learned and experienced Judge was quite of the opinion I have expressed as to the nature of the corroboration when he says, "unless the evidence other than his own tends to prove that contract, it is not corroborative, for if that evidence is as fairly consistent with a different arrangement or with another state of things the plaintiff fails."

Judgment.  
BURTON,  
J.A.

If for instance an action were brought against an executor upon several notes alleged to have been made by his testator, the making of which was disputed, although sworn to by the plaintiff; if he is corroborated as to one only, by a witness who swears that he was present when it was signed, but as to the others there is no corroborative evidence, is it not clear that whilst the plaintiff would be entitled to recover upon the one issue, he ought beyond question to fail as to all the others?

I take it that if there had been an Act in England similar to our own at the time of the decision upon Lord St. Leonard's will, it would have been necessary in support of each separate devise or bequest to have given some evidence to support Miss Sugden as to that separate devise; but as they had no such law, and as Miss Sugden was corroborated in a great number of particulars, the learned Judge was warranted in holding her evidence sufficient, as in fact he might legally have done had there been no corroboration.

I quite agree with Chief Justice Armour that, if there is evidence adduced corroborating the evidence of the interested party in support of his claim or defence in any material particular, it must be submitted to the jury as sufficient corroboration in point of law, the weight to be attached to it in point of fact being a matter for their consideration.

That is the well understood rule in all cases, but the question remains what is meant by a material particular.

Judgment.

BURTON,  
J.A.

The present is, I think, a case calling for a strict enforcement of the rule.

The alleged contract was at first sworn to have been made in June, but as the testator was then dead, this was obviously impossible, and the plaintiff then swore that it was made in May, a few days only before the testator's death; and some of the work done was actually done after the plaintiff knew that the executors were disputing their liability.

And what is relied on as corroboration, is two papers partly in the hand-writing of the testator, which are consistent with his intention to put up such a building, but so little did the plaintiff know of the matter, that he supposed that the proposed building was to be erected in Deer Park, and not in the Queen's Park, as the sketch shows.

It is not shewn how these papers came into the possession of the plaintiff, but it is shewn that he and the deceased occupied offices close together on the same flat, and I think it was said they had a suite of offices opening into each other. I have not the slightest intention of imputing that they came improperly into the possession of the plaintiff, but I am endeavouring to show that he has not satisfied the onus that the law imposed upon him of proving his case by other corroborative evidence. I do not at all concede that if he had proved by a witness that he had seen the deceased hand the documents to the plaintiff, without more, that that would have been sufficient.

But here there is no evidence of how the documents came into the plaintiff's possession. We are asked to infer in the first place that the deceased handed them to him, and then we asked further to infer, founded upon that inference, that they were so handed to him as instructions to prepare plans. I think if such be the law, the statute may as well be repealed.

The learned Judge was warranted by some of the authorities he alludes to, binding upon him, in deciding as he did, although this case goes, I think, far beyond any



decided case ; but we are not bound by those authorities, and in this Court, although I do not agree with the late Chief Justice as to the statute being merely declaratory of the Common Law, as I understand his language, and that of the majority of the then Court of Appeal, they agree in the view I have expressed as to what corroboration is necessary.

Judgment.

BURTON,  
J.A.

I concur entirely with Mr. Justice Grove, that there must be something more than a mere scintilla of evidence. Under the circumstances of this case, I think that there was no such corroboration as the statute requires, and that the documents cannot be relied on to support the contract alleged.

For these reasons I am of opinion that the appeal should be allowed.

*Appeal dismissed with costs, BURTON, J.A.,  
dissenting.*

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## SIBBALD v. GRAND TRUNK R. W. Co.

## TREMAYNE v. GRAND TRUNK R. W. Co.

*Railways—Level crossings—Ringing bell—Defect in construction—Trespassers—Negligence—Damages—New trial.*

Judgment of the Chancery Division in favour of the plaintiffs, reported 19 O. R. 164, affirmed upon the ground that the defendants had omitted to comply with the statutory requirements as to ringing the bell when approaching a railway crossing [BURTON, J.A., dissenting].

*Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 432, 9 S. C. R. 311, considered.

*Per* HAGARTY, C.J.O.—Where a railway company in constructing their railway cross an existing highway in a diagonal direction leaving the road-bed of the line some feet below the level of the highway they exceed their statutory powers and are liable to indictment. They are therefore trespassers *ab initio* and chargeable with all injuries resulting even indirectly in consequence of the dangerous condition of the highway to those lawfully using it, and this liability attaches to a company operating the line who have not themselves been concerned in the original improper construction.

*Per* MACLENNAN, J.A.—At the time the road was constructed it was illegal to make a crossing in the manner in which it was made by the company constructing the road and at the time of the accident it was an illegal crossing no matter what company was operating it.

## Statement.

THESE were appeals by the defendants from the judgment of the Chancery Division, reported 19 O. R. 164, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 22nd and 23rd of September, 1890.

*McCarthy*, Q.C., and *W. Nesbitt*, for the appellants.

*Shepley*, Q.C., and *S. W. Burns*, for the respondents.

January 13th, 1891. HAGARTY, C.J.O. :—

As far as I can understand it, the railway enters the 66 feet road allowance and runs diagonally over it for over 400 feet, but in the general direction of its own line. The travelled portion of the old road appears to have been deflected from its course in order to cross the railroad almost at a right angle.

It is not easy, without a sketch or plan, to explain clearly the change made in the execution of the railway work.

Judgment.  
HAGARTY,  
C.J.O.

It appears that the company commenced excavating within the line of the highway north of the crossing for grade purposes, and continued the excavation, laying their line therein, going north along the east of the actual travelled road, but cutting into it some five, six, or eight feet, as variously described.

The effect of laying the railroad in this excavation was to leave the actual travelled road narrower than before, with a slope or drop about two feet six inches down into the excavation, and without any protection whatever.

It must be kept in mind that all this work—graded road, excavation and track of railway—are within the original road allowance. It was stated in evidence that the road, the whole, from fence to fence, was level, and travel done from fence to fence.

The plaintiffs were driving southward, with a pair of fresh horses. As they were coming down the hill they saw the engine and tender coming north. The coachman jumped down and held the horses' heads.

The plaintiffs say the place was too narrow to turn. As the train approached, the horses broke from the man, wheeled round, and the waggon rolled down the slope on to the track just in front of the approaching train, which could not be stopped in time, though going very slowly. Mrs. Anderson was killed, and Dr. Sibbald lost his arm.

The engine driver saw the horses when stopped, but thought all was safe—that if not held back the plaintiffs could have crossed easily before the train reached the crossing. The train had actually passed the crossing when the waggon with the plaintiffs rolled over down the slope in front of it. The driver stopped whistling when he saw the horses held back, so as not to frighten them.

There was much contradiction, as usual, as to the whistle being sounded and the bell rung. It was argued that if proper signals were given at the crossing, Dr. Sibbald would

Judgment.

HAGARTY,  
C.J.O.

not have come down the hill so far, and thus have avoided danger.

The answers of the jury at the trial before my brother STREET, bring out the leading facts.

1. Did the Lake Simcoe Junction Railway Company, at the place where the accident happened, excavate a portion of the highway, and carry their line of railway across the highway through the excavation? A.—Yes.

2. If so, how much lower is the line of the railway, in consequence of the excavation, than the highway at the point where the accident happened? A.—Two feet six inches.

3. Was the highway rendered less safe, by reason of the difference in level, caused by the excavation between the highway and the railway, at the point where the accident happened? A.—Yes, by reason of the fact that as the legal allotment for the public highways in the said township is 66 feet, which has been reduced by said excavation.

4. Was the graded portion of the highway rendered narrower by the excavation made by the railway company? A.—Yes.

5. Did the railway company, after the completion of the railway, replace the travelled part of the highway as it was before the work was begun? A.—No, they did not; neither did they substitute a road equal as to point of safety to the one destroyed by the company.

6. Was the whistle sounded or the bell rung at least 80 rods from the crossing? A.—That the engineer did give three sounds of the whistle somewhere about 80 rods south from the crossing.

7. Was the bell rung, at short intervals, for a distance of about 80 rods from the crossing, until the engine reached the crossing? A.—No; the bell did not ring; nor was it sounded by the fireman.

8. Could the plaintiff, Dr. Sibbald, by the exercise of reasonable care, have avoided the accident which happened to him? A.—He could not have avoided the accident; he did exercise reasonable care in the course of it.



9. Could Mrs. Anderson, by the exercise of reasonable care, have avoided the accident which happened to her? A.—She could not have avoided the accident by any special care of her own.

Judgment.

HAGARTY,  
C.J.O.

10. If the plaintiff, Dr. Sibbald, is entitled to recover damages, at what sum do you assess them? A.—That he is entitled to \$2,000.

11. If the children of Mrs. Anderson are entitled to recover any damages, at what sum do you assess them to each of the children? A.—To Clarence, 13 years old, \$2,800; to Allan, 10 years old, \$3,200.

12. In your opinion, was the accident caused by negligence on the part of the defendants? A.—Yes.

13. If so, what was the negligence of the defendants which caused the accident? A.—Their negligence consisted in not constructing any fence or other protection on the portion of the road or highway; and that the non-ringing of the bell was contributory to it.

On these findings verdicts were entered for the plaintiffs in both actions.

After argument in the Chancery Division, the motions against the verdict were dismissed. See 19 O. R. 164.

The decision seems chiefly rested on the ground that “the jury evidently believed, and in effect find, that had the whistle been sounded or the bell rung at intervals, as directed by the statute, the plaintiffs would have been warned not to come down the slope of the hill, and so would have avoided being hampered by the narrowness of the roadway.” \* \* Again, the learned Chancellor says: “As I regard the evidence and findings, the verdict may rest upon the ground covered by the decision in the *Rosenberger Case*. \* \* The jury have thought it to be a place where, for two-fold reasons, great precaution should have been used, and find that not even the warning which the statute prescribes was given.”

He notices also the state of the road, but states that he need not consider the liability of the defendants for the unsafe condition arising from the original construction by

Judgment.  
HAGARTY,  
C.J.O. the Lake Simcoe Junction Company some ten years ago ; that he finds no express decision ; he adds that his "impression is that the dangerous state of the public road being open to observation, liability would rest upon the operating railway, though it was not responsible for the original faulty construction."

The Lake Simcoe Company, incorporated in 1873, before the road was completed agreed to lease the same for twenty-one years to the Toronto and Nipissing Company, with full working powers, agreeing with the latter to build and complete the road, then the Nipissing Company to work it, furnishing all plant, &c., with entire control, &c. Their charter, (sec. 23) allows them to lease their road to any other company, who may thereupon exercise all the rights and privileges of this charter.

By 45 Vic. ch. 67 (O.), The Toronto and Nipissing Railway Company and other railways were consolidated with the Midland Railway Company into one company, as the Midland Railway Company. Section 27 declares the agreement between The Lake Simcoe Railway Company and The Toronto and Nipissing Railway Company to be binding on The Midland Railway Company.

47 Vic. ch. 69 (O.) authorizes the Lake Simcoe Company to sell their lines and franchises and rights, &c., to any other company who shall have all their rights, &c., and sec. 6 directs that on approval of the sale by the Midland Railway, the successors of the Nipissing Company, the agreement with the Nipissing Company shall terminate.

In 1883 it is said the Grand Trunk Railway Company "took over all the lines of the Midland Railway Company, rolling stock, &c., the two systems to be worked under same management. A small sum of £200 sterling to be paid 'for the maintenance of the corporate organization' of the Midland Railway." This latter statement was made in the Chemong case.

In 1888 the Grand Trunk Railway Company obtained an Act—51 Vic. ch. 58 (D.)—to raise money and increase capital for purposes specified in a schedule annexed, and on the

securities therein mentioned. This schedule seems to comprise all the railways taken over by and then under the Grand Trunk system. Amongst them is "Lake Simcoe Junction (lease) stock, \$34,100."

Judgment.

HAGARTY,  
C.J.O.

As to everything connected with the state of the road, the working of the lines, &c., I consider the liability of the Grand Trunk Company to be the same as if the line had been built by them.

The point taken in *Bate v. Canadian Pacific R. W. Co.*, 15 A. R. 388, that the latter, taking over under an Act of Parliament the portion of the road constructed originally by the Government, were not liable for a latent defect in the original construction causing a subsidence of the roadway, cannot arise here. The case did not ultimately turn on any such point.

Here the alleged faulty construction was always fully apparent, an excavation for purposes of the railway on the public high road, leaving in effect an unprotected drop of 2 feet 6 inches as into a ditch from the travelled portion of this road down to the line of rails.

The jury found the facts:—That the old company excavated a portion of the highway, carrying their line through the excavation 2 feet 6 inches below the highway; that the highway was thus rendered less safe; that the graded portion was rendered narrower by the excavation; that the company did not replace the travelled road as it was before, nor provide a road equal in point of safety to the one they destroyed; that defendants were negligent, and that the negligence that caused the accident consisted in not constructing any fence or other protection on the portion of the road or highway, and that the non-ringing of the bell was contributory to it.

Of course the protection said to be required was between the actual travelled road and the excavation.

I think the 13th answer of the jury very fairly described the proximate cause of this terrible accident.

It was objected to us in argument that the defendants were not bound to fence, and had no right to erect fences

Judgment. on the highway, and that the effect of this finding was to  
HAGARTY, make neglect to fence the proximate cause, and not the  
C.J.O. non-ringing of the bell.

I cannot read the evidence without believing that this accident happened at a most dangerous spot.

Apart from any action of railways, if this excavation had been made by a municipality for narrowing the graded road, and they had left an unfenced drop of several feet, and a waggon, in consequence of the horses taking a sudden fright, had been overturned over this slope, a strong case might possibly be proved within the principles laid down in such cases as *Toms v. Corporation of Whitby*, 35 U. C. R. 195.

The original Act of incorporation of the Lake Simcoe Company introduced the clauses of the general Railway Act of Canada as to crossing highways, with a penalty of \$40 for any contravention of the provisions as to replacing the highway on completion of the works.

On completion of the work the highway is to be replaced. "The rail itself, provided it does not rise above, or sink below, the surface of the road more than one inch, shall not be deemed an obstruction."

I think this clause 10, when it speaks of "crossing an existing highway," must apply to the whole highway, and not merely a portion specially graded or otherwise improved for travel. As general law it is very clear as laid down by Martin B., in *Regina v. United Kingdom Electric Telegraph Co.*, 9 Cox 174, and affirmed by the full Court: "In the case of an ordinary highway (although it may be of a varying and unequal width) running between fences, one on each side, the right of passage or way, *primâ facie* and unless there be evidence to the contrary, extended to the whole space between the fences, and the public are entitled to the use of the entire of it as a highway, and are not to be confined to the part which may be metalled or kept in repair for the more convenient use of carriages or foot passengers;" and a permanent obstruction erected on a highway, and placed there without lawful authority, which



Judgment.

HAGARTY,  
C.J.O.

renders the way less commodious than before to the public, is an unlawful act, and a public nuisance at common law. Also *Regina v. Train et al.*, 2 B. & S. 640; *Soule v. Grand Trunk R. W. Co.*, 21 C. P. 308.

If this excavation be, as I think it is, a public nuisance, as an unauthorized obstruction, an indictment would lie therefor, and it would, I presume, be laid against, not a defunct or dormant corporation which has handed over its powers to others, but against the company or persons actually continuing and using for their own purposes the obstruction. So also as to the penalty for not restoring or replacing the highway.

The municipality or the public have, I presume, an existing right to have the law enforced in respect of this railway crossing the highway; it is a continuing nuisance from day to day; and necessarily the remedy must be against those actually using the railway and thus continuing the nuisance and injury to those using the highway.

The municipality may have been remiss in asserting its rights when the old company first created the obstruction. But their liability would be no reason why the remedy should not exist against the actual *tort feasons* or their successors who continued the obstructing: *Maltby v. Chicago Railway*, 13 E. & Am. Ry. Cases, 606. The plaintiffs lawfully using the highway cannot be affected by such remissness, but have the right to complain as soon as the injury has occurred, and the complaint is naturally against the company actually using and operating the railway and wrongfully continuing, for the use of the line, the unlawful obstacle, whether it be an erection or an excavation, dangerous to the public use.

No injury resulted to the plaintiffs from the original violation of the law—they had no claim against any party or company apart from the general public until they sustained damage.

We have not been referred to any English decision on the point whether the operating company may be responsible for continuing to use a road crossing a highway

Judgment.

HAGARTY,  
C.J.O.

which was not replaced as required by the Act to its former usefulness.

No railway company there can delegate any of its powers, or transfer its franchises to another company, except by legislative authority—all arrangements for leasing or transfer of franchise, &c., must be made under the Act with the approval of the Board of Railway Commissioners.

Here it is wholly dependent on statute law.

In the last statute, 47 Vic. ch. 69 (O.), the Lake Simcoe Company was authorized to sell their line and rights and franchises. No power is there given to lease.

I have examined many American authorities, but have not found any case resembling this exactly in its facts.

Chief Justice Redfield, in his well-known work on Railways, 6th ed., vol. 1, p. 658, says: "It seems to be regarded as settled that the persons or corporation who come into the use of a railway company's powers and privileges are liable for their own acts while continuing such use, and also for the continuance permissively of any wrong which had been perpetrated by such company upon land holders or others, by means of permanent erections which still remain in the use of their successors." I refer to the sections in his work (Vol. 1) from 142 to 145 inclusive.

The nearest case in its facts that I have seen is *Wasmer v. Delaware, Lackawanna and Western R. W. Co.*, 80 N. Y. 215. The defendants were lessees of the Utica Railway Company, who had built the line on a street which was to be restored, &c. They did not so restore it, the rails being left projecting four and a-half inches above the surface without any planking or filling. A man driving across was killed.

Earl, J.: "Schuyler street was not restored to its former state, and it was at least a question for the jury whether its usefulness was not unnecessarily impaired. It is very probable that this accident would not have occurred if there had been some filling on the side of the

rails, so that the wheels of the waggon could readily have passed over them. The defendant cannot escape liability for this condition of the railway because it was simply the lessee of the road. It had the possession, the use, and the control of the road, and could not keep and maintain the rails in such way in the street as to be dangerous to travellers thereon, and yet escape responsibility. He who knowingly maintains a nuisance is just as responsible as he who created it." He refers to *Brown v. Cayuga R.W. Co.*, 12 N. Y. 486, which is to the same effect.

Judgment.  
HAGARTY,  
C.J.O.

He adds that in addition it appeared that the rails in use at the time of the accident were such as were placed there by the defendants; as I understand it, in the same position as the rails were in the original construction.

I think the American cases warrant the conclusion that the Courts there would hold the company actually using and controlling the road as its own, answerable for damages sustained as here by the original creation of a dangerous obstruction in a highway, as a continuing nuisance existing from day to day: *The People v. Chicago and Alton R. W. Co.*, 67 Ill. 118.

Lawrence, C.J., says: "An obligation to keep up a crossing, imposed as a condition of the right to cross a highway, must be regarded as necessarily attaching to whatever person or corporation may be the owner of the road as long as the right is exercised. It is a continuing condition inseparable from the enjoyment of the franchise."

He notices that the charter of the former company expressly required the road crossed to be restored to its previous usefulness, and while the charter of the existing company was silent on the point, yet as it was created for the purpose of purchasing the franchises of the pre-existing companies, and the road built by them, and had so purchased it, it must be held to have assumed the same duties towards the public imposed by preceding charters.

The facts as to the change of corporations are not stated except in these words.

The head-note states the ruling to be general on any

Judgment.

HAGARTY,  
C.J.O.

company owning and operating the road. This case is quoted approvingly in *Little Miami R. W. Co. v. Commissioners*, 31 Ohio St. 338.

The original company had built the road crossing a highway with certain obstructions unremedied. Years after they leased to the defendants, who agreed to assume all liabilities and obligations.

The chief question was as to the Statute of Limitation, which was held not to be a bar, every continuance of a nuisance being a fresh nuisance. The point as to the defendants' liability is not noticed. Judgment was against them.

See *Welcome v. Inhabitants of Leeds*, 51 Me. 313, as to the restoration of the highway being a continuing obligation for all time. See on the general law such cases as *Nelson v. Vermont and Canada R. W. Co.*, 26 Vt. at p. 721; *Sprague v. Smith*, 29 Vt. at p. 425; *Clement v. Canfield*, 28 Vt. at pp. 304-5; *Pierce v. Concord R. W. Co.* 51 N. H. 590; *Patterson's Railway Accident Law*, pp. 132-3, 156 and notes; *Ditchell v. Spuyten Duyvil R. W. Co.*, 67 N. Y. 425. And see *Illinois Central R. W. Co. v. Kanouse*, 39 Ill. 272; *Toledo R. W. Co. v. Rumbold*, 40 Ill. 143; *McCall v. Chamberlain*, 13 Wis. 713; *Thompson v. Gibson*, 7 M. & W. 456, as to a lessee company using a road in a defective state, being responsible if public safety require certain appointed safeguards to be provided.

It is clear that by English law the lessee or vendee continuing previously existing nuisances is liable, though the original creator may also be liable: *Pollock on Torts*, 2nd. ed. p. 371; *Todd v. Flight*, 9 C. B. N. S. 377. In the case of an erection injuring a plaintiff's rights, he may sue both the erector and his lessee: *Rosewell v. Prior*, 2 Salk. 460, discussed in *Cheetham v. Hampson*, 4 T. R. 318; *Regina v. Watts*, 1 Salk. 357.

The Court said (in the last case) that the defendant was the occupier of a house upon the highway, ruinous and likely to fall, and the continuing the house in that condition was continuing the nuisance, and as the danger was the



matter that concerned the public, the public were to look to the occupier, and not to the estate, which was not material in such a case to the public.

Judgment.  
HAGARTY,  
C.J.O.

In *Coupland v. Hardingham*, 3 Camp. 397, Lord Ellenborough held to the same effect: "As soon as the defendant took possession of the premises he was bound to guard against the danger to which the public had been before exposed, and liable for the consequence of neglecting so to do, in the same manner as if he himself had originated the nuisance."

This case is commented on on other grounds in *Cornwell v. Commissioners of Sewers*, 10 Exch. 771, and by Blackburn, J., in *Fisher v. Prowse*, 2 B. & S. at p 781, but the general statement of the law is not questioned.

The whole tendency of our law seems to me to establish that the liability of all persons actually occupying or using premises causing a nuisance, or using an excavation in a highway for their own purposes or profit, stands, as to the injured public, on the same footing as that of the original creators of the nuisance.

I would summarize my view thus :

1. That the road as originally built was a nuisance to travellers on the highway, and its lawful user only conditional on complying with statutable directions.

2. That any other company taking and using it for a railway, is bound to the same extent as its lessors or vendors, and that every user by them is a continuing unlawful nuisance to the public travel, and is at the peril of such company.

3. That the plaintiffs were injured by such user as a railway by the continuance of such nuisance to the highway, and are entitled to recover from the company actually using and controlling the road.

We have not been informed as to the final dealing between the old company and the defendants. If we can draw any legal inference it must be that the Grand Trunk being in actual visible possession and use of the line, it is so under the authority of the Act of 1884, which only allows a sale of franchise, &c.

Judgment.

HAGARTY,  
C.J.O.

Although I do not confine my judgment to the one point as to the want of signals, on which the Divisional Court apparently rested its decision, it would hardly seem that it was objected in that Court that the jury had not expressly found the proximate negligence to be the want of statutable signals.

The Chancellor says: "The jury have found, not against the weight of evidence, that the statutory obligations as to notes of warning was not complied with, and that this omission was contributory to the accident. It is easy to see how the evidence led them to conclude as they did."

He then notices the dangerous state of the highway, and says: "The jury evidently believed, and in effect found, that had the whistle been sounded, or the bell been rung at intervals, as directed by the statute, the plaintiffs would have been warned not to come down the slope of the hill, and so would have avoided being hampered by the narrowness of the roadway."

I am not disposed to criticise the mere form of the questions and answers too minutely. I think we are bound to take the whole of them together, and as far as is possible, apply each to the explanation of the other.

Thirteen questions and answers, though very properly put and elicited by the learned Judge, are here fulfilling their usual function of furnishing material for counsel's brief.

It is objected that the jury did not find expressly as in the sixth answer in the *Rosenberger Case*. I gather from the notes that the questions to be submitted to the jury were discussed by the counsel, and no such question as in the *Rosenberger Case* was suggested.

The plaintiffs insisted to the last moment,—at the end of the charge to the jury—with reference to the question what was the negligence, that there were two causes, viz., the condition of the road, and the failure as to signals; to which the learned Judge answered that he had fully explained that to the jury as to the negligence alleged by the plaintiffs.

The two Rules 755 and 791 shew the strong tendency of modern practice, extending the Court's power when satisfied it has before it all the materials for finally determining the question in dispute, and also as to not taking the jury's opinion on a question which the Judge was not asked to submit to them, where no substantial wrong or miscarriage has been thereby occasioned.

It is not necessary for us to weigh the evidence, or express our view of its weight; there was evidence, if believed, to warrant the finding.

Judgment.

HAGARTY,  
C.J.O.

OSLER, J.A. :—

It appears to me that the findings of the jury in answer to the 7th, 8th, 12th and 13th questions, bring the case within the decision of the Supreme Court in the case of *Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 311.

The questions must, undoubtedly, according to every rule of practice and convenience observed in the trial of a cause, be read in connection with the charge of the learned trial Judge.

Where the jury find that the bell was not rung, and that the negligence of the defendants' servants in this respect was contributory to the accident, we must look at what they were told to consider in arriving at their conclusions, and framing their answers. "Suppose you find," says the learned Judge, "that the bell was not rung, then you have to come to the question whether the failure to do so was the cause of the accident, taken in connection with the other circumstances of the case. If you think the plaintiffs' could have turned away from the crossing after seeing the engine, then the fact that the bell was not rung would not be the cause of the accident;" and that part of the direction is amplified and explained. Then the Judge proceeds: "But if you think—if you come to the conclusion that by reason of the neglect of defendants to comply with the law in respect of the ringing of the bell Dr. Sibbald had approached too near the train, in a position, that he had got

Judgment.

OSLER,  
J.A.

into such a position that he could not turn away when the train did come into sight, then no doubt you will come to the conclusion that the neglect of the defendants in this respect was one of the causes which led to the accident." In all fairness the answer must be read in direct connection with the passage of the charge. It then appears that it was because of the neglect of the defendants to announce the approach of the train that the plaintiff Sibbald came so near to the crossing, and got into a position on the slope of the hill where he could not move away when the engine came into sight; and thus, though the precise question which was put in the *Rosenberger Case*: "If the plaintiffs had known the train was coming would they have stopped the horse further from the railway?" was not here put to the jury, the fact there found, if important, is found here also, and is included in their answer. I am not now concerned to discuss that decision, even if I could do so with propriety.

In *O'Donnell v. The Providence and Worcester R. W. Co.*, 6 R. I. 211, which was not cited to the Court which dealt with the *Rosenberger Case*, there is a dictum that the neglect to give the statutory warning can only be complained of by a person who has sustained injury by an actual collision at a crossing.

On the other hand the following decisions are in accord with, or are not opposed to, that of our Supreme Court, viz., *Randall v. Baltimore R. W. Co.*, 109 U. S. 478; *Harty v. Central R. W. Co.*, 3 Hand. (42 N. Y.) 468; *Voak v. N. Y. Central R. W. Co.*, 75 N. Y. 320; *Hart v. Chicago R. W. Co.*, 7 N. W. Rep. (Iowa) 9; *People v. N. Y. Central R. W. Co.*, 25 Barb. 199.

Whether our former decision does or does not place the sound construction upon the statute, and we are now forced to assume that it does, it is at all events a highly beneficial and useful construction in the interest of the public using the highway. I do not think that the fact of the railway crossing the highway diagonally can make any difference. They had the right to do so on the line or



direction of the railway, and their liability, as well as the rights of the public, must be the same at whatever angle the crossing is made. It was argued that the 13th finding is ambiguous, but I do not think so. The jury say that the negligence of the defendants consisted in not constructing any fence or other protection on the road or highway; and that the non-ringing of the bell was contributory to the accident. It may be conceded, as I think it must be, that the defendants were not bound to construct a fence on the road, and indeed had not the right to do so, as the public had the right of crossing from one side of the highway to the other, in any direction, at every point in it from where the railway entered it to where it left it, and therefore that ground of negligence is non-existent. But can that affect the other ground of negligence which the jury have also found, which substantially is that in the surrounding circumstances, the unfenced state of the ground, and so forth, the non-ringing of the bell was contributory to, that is to say, was one of the causes of the accident?

Judgment.

OSLER,  
J.A.

I think the judgment of the Chancery Division is right, and should be affirmed.

I wish to add that in the examination of some of the questions which have been raised or considered in this case but upon which I do not regard it necessary to express an opinion at this time, I have been embarrassed to some extent by the absence of any clear or distinct evidence as to the legal relation borne towards each other by the defendants, and by both of them to the Lake Simcoe Junction Railway, whose lines they are operating, and by whom the work of excavating and cutting down the highway at the crossing was done. It is possible that a plaintiff suing these companies, or the Grand Trunk Railway Company, may hereafter find himself in a difficulty, unless he clearly brings out the relationship of that company to another on whose line the alleged injury or accident giving rise to liability occurs, or unless he obtains admissions which may render such evidence unnecessary.

Judgment.

OSLER,  
J.A.

It may indeed be quite as important for the defendants as for a plaintiff to furnish such evidence if they wish it to be found that they were rightfully on the line, and not intruders into the franchise of another company, using it for their own benefit without authority.

The cross-appeal as to reduction of damages awarded to Clarence Anderson, must be dismissed; the plaintiff accepted the terms, and assented to the reduction of the judgment rather than submit to a new trial, and cannot therefore now complain. There was power to grant a new trial, and injustice would be done if that course had not been taken.

MACLENNAN, J.A. :—

The railway crossing in question was constructed by the Lake Simcoe Junction Company before the year 1882, under the provisions of the Ontario Railway Act, or rather of the old Consolidated Statutes of Canada, for that company was incorporated by a Statute of the Province in 1873, which conferred upon them no special powers beyond what the general Railway Act gave them.

That Railway Act so far from authorising the company in crossing the highway to lower its grade or level, expressly forbade it by sec. 12, sub-sec. (2), re-enacted in R. S. O. ch. 165, sec. 21, sub-sec. (2), and R. S. O. (1887), ch. 170, sec. 29, sub-sec. (2).

In making the crossing in question, the company made a long excavation in an oblique direction across the highway, about two feet and a half deep, and laid their rails in the hollow space thus formed. They then adapted the grade of the highway on both sides for some distance to the depression in which their track lay, so that the approaches should be reasonably convenient. But instead of making the approach to the rails the full width of the highway, or even the full width of the former roadway, the latter where it was graded to cross the rails was narrowed from about twenty-four to sixteen feet, and at the place where the

accident occurred the approach to the rails was by a sudden descent or drop of two feet and a half.

Judgment.

MACLENNAN,  
J.A.

Not only was there no authority under the Ontario Railway Act to lower the grade or level of a highway in order to cross it on the level, but neither was there any such power under the Dominion Railway Act of 1868, or under that of 1879.

To do so was forbidden by sec. 10, sub-sec. (2), of the Act of 1868; by sec. 15, sub-sec. (2), of the Act of 1879, and by sec. 12, sub-sec. (2), of ch. 109 of the R. S. C., in the same terms exactly as in the Consolidated Railway Act of old Canada, and the later Acts of the Province of Ontario.

It was not until the 22nd of May, 1888, that the disabling section was repealed by 51 Vic. ch. 29, when the whole Act was recast, and the section referred to omitted.

It appears to me to be clear that this crossing was an illegal crossing when it was first constructed, and that it continued to be so until the 22nd of May, 1888, when the clause forbidding such crossings to be made was repealed.

Now it might be contended that the repeal of the clause in question had the effect of legalising the crossing which was illegal before, that having the power to cross highways somehow the particular method which they adopted for the purpose was illegal only so long as the enactment forbidding it stood. But whatever may be the force of that argument in a proper case, I think it cannot be used here.

So far as this crossing is concerned it was made by the Lake Simcoe Junction Company. That company is still subject to the unrepealed clause of the Ontario Act, for although that railway may now be subject to the jurisdiction of the Dominion Parliament, and although the Railway Act of Canada may be applicable to it, yet section 3 of that Act declares that it is applicable to any particular company only subject to the express provisions of the special Act, and by an express clause (sec. 2) of the special Act the clauses with respect to highways and bridges of the Railway Act of old Canada shall apply to the company

Judgment. and its railway. This is further enacted by sec. 8, of 45  
MACLENNAN, Vic. ch. 67 (O.), the Midland Railway Consolidated Act.  
J.A.

Now that particular clause is not in the slightest degree inconsistent with the provisions on the subject of highways of the Railway Act of Canada, the two may stand perfectly well together, and I have come to the conclusion that in October, 1888, when the accident occurred, the crossing in question, no matter what company was running upon it, was an illegal crossing. The highway had been excavated, and its level lowered two feet six inches, to enable the railway to cross it instead of the company raising the grade of the railway, and leaving the level of the highway as it was.

The crossing being thus illegal, neither the Lake Simcoe Junction Company, nor the Midland Company could themselves lawfully use it, nor could they confer on the Grand Trunk Company a power or right which they themselves did not possess, and could not exercise.

The Grand Trunk Company therefore, in my opinion, had no legal right to make use of the crossing with their locomotives, and must therefore be responsible for the deplorable accident which would in all probability not have occurred if the highway had been left as it was, and if the grade of the railway had been raised instead.

I think the liability of the Grand Trunk Company follows from *Sadler v. South Staffordshire Steam Tramways Co.*, 23 Q. B. D. 17, and also from the reasons more fully stated in the judgment of the learned Chief Justice.

I also agree entirely with the judgment just read by my learned brother Osler, that the defendants are liable on the authority of the *Rosenberger Case*.

BURTON, J. A.:—

The plaintiffs at the trial placed their right to recover upon two grounds: That the highway on which they were travelling was rendered narrower at the place of the accident than it was in its original state before the



construction of the railway by the Simcoe Junction Railway Company; and that the defendants omitted to comply with the statutory requirement as to sounding the whistle and ringing the bell when approaching a railway crossing.

Upon the first point the learned counsel on the argument before us contented himself with saying that upon the first four questions being answered as they were, it became a mere question of law; recognizing probably the difficulty of maintaining the proposition that a company which was merely operating the line could be made responsible for a liability, which even if it existed, was that of another company many years previously, not in reference to the line which the defendants are operating, but in reference to the highway which that company, it is alleged, have rendered less convenient for the travelling public.

He would, I think, have found it difficult to find authority for such a proposition, although I quite admit that if at the point of intersection where the highway crosses the railway, or for that matter upon any portion of the highway, the defendants had allowed the railway to rise above or sink below the level of the highway more than one inch, or had operated it in a defective condition and an accident had resulted from it, they would be liable for the consequences.

There was another reason which probably influenced the learned counsel in not dealing more fully with that branch of the case, viz., that the answers to these questions, in the view the jury took of the cause of the accident, became immaterial, they having found that the negligence of the defendants consisted in not constructing any fence or other protection on the portion of the road or highway, and that the non-ringing of the bell was contributory to it.

The learned counsel therefore who argued the case in this Court laboured to show that the place where the accident occurred was an approach to the crossing within the meaning of sec. 186, and should have been fenced.

There was an evident misapprehension in the minds of the jury as to the rights of the railway company. The Legislature has very wisely prohibited them from carrying

Judgment.

BURTON,  
J.A.

Judgment.

BURTON,  
J.A.

their railway along a highway without the consent of the municipal authorities, but as a matter of necessity they must in constructing their railway from one terminus to the other cross any highways between those two points, sometimes directly at right angles, in others more or less diagonally; in this case they occupy the highway for a long space in crossing. This they had an absolute right to do subject only to the restriction I have mentioned, and if the whole of the highway had been on the same level as the railway, the railway would in places, if the evidence is to be believed, have encroached upon the gravelled portion of the highway before it actually crossed it, and yet they would have been free from liability except for negligence. A fence might have been just as necessary in such a case as in the present and yet no one would pretend that they would have been under any obligation or would have had any power to construct such a fence.

The road was built under an Act of the Ontario Legislature, by another railway company, but the road itself had at the time of the accident passed under the jurisdiction of the Parliament of Canada, and it was assumed on both sides that the Dominion legislation at that time in force in regard to railways applied.

Counsel then contended that under sec. 186 of the Railway Act of 1888, they were bound to fence. That section must be read in connection with secs. 184 and 185.

The first of these sections again provides that whenever a railway crosses a highway without being carried over it by a bridge, or under it by a tunnel or bridge, whether the level of the highway remains undisturbed, or is raised or lowered to conform to the grade of the railway, the top of the rails shall not, when the crossing is completed, rise above or sink below the level of the highway more than one inch.

The next section regulates the dimension of bridges over highways, and the inclination; and then sec. 186 deals with the inclination of the ascent or descent, as the case may be,

of any approach by which any roadway is carried over or under any railway, or across it at rail level, and provides that it shall not be greater than one foot of rise or fall for every twenty feet, unless the Railway Committee directs otherwise—this applies to the artificial approach necessary to connect the highway as it existed previously with that portion of it which had been raised or lowered to enable the railway to continue on the grade decided on in its construction—in either of these cases of raising or lowering, even though a bridge or tunnel may not be required, an artificial approach becomes necessary in order to make the highway suitable for travel, and this section assumes therefore to regulate the inclination of these approaches, and provides that these approaches shall be fenced. It has no application to a case like the present where no artificial approaches were required, but where the rail crossed the road at the level of the latter—not above or below it—no interference with the grade of the highway being necessary.

Judgment.  
BURTON,  
J.A.

Mr. Shepley's attempt to extend these provisions to the side of the road some 195 feet from the crossing, and calling it an approach merely because it led to the crossing, has the merit of novelty, but the argument was more ingenious than sound.

In the absence, therefore, of any statutory obligation, it is difficult to see of what omission of duty these defendants were guilty in reference to the fencing, and the jury finding them guilty of negligence by reason of such omission, does not make them so, but they add to their finding upon that point that the non-ringing of the bell was contributory to it—whatsoever "it" may mean. I assume they mean the injury, not the negligence.

But I am unable to see how that assists the plaintiffs. The rule of law is, that negligence to render the defendants liable, must be *causa causans*, or the proximate cause of the injury.

There is no doubt, and the jury have so found, that at the distance of eighty rods from the crossing the engineer did give three sounds of the whistle, and although there is

Judgment.

BURTON,  
J.A.

the usual amount of contradictory evidence of the ringing of the bell, it appears from the plaintiffs' evidence that their party saw the engine at the south cattle guard which is 280 feet from the crossing, some 475 feet from the place of the accident, and the little boy who was in the waggonette says he heard the bell ringing after he saw the train. The conductor says he gave directions after he saw the waggonette not to ring the bell for fear of frightening the horses. It is clear, therefore, that the non-ringing of the bell was not in itself the cause of the accident, and the evidence on that point was wholly immaterial.

The defendants were not bound to ring the bell after passing the crossing, and the accident occurred at a point some 100 feet from the crossing and after the train had passed it. But the learned Chancellor says the jury evidently believed and in effect found that had the whistle been sounded or the bell been rung at intervals as directed by the statute, the plaintiffs would have been warned not to come down the hill. With great deference to the learned Judge, this appears to be pure conjecture and there is no such finding by the jury. Had there been such a finding, and any evidence to warrant it, the case would perhaps have been brought within that of *Grand Trunk R. W. Co. v. Rosenberger*, 9 S. C. R. 311, which though binding upon this Court, I may say without disrespect, I bow to without being convinced; and I merely wish to add that the learned Judge who delivered the judgment in the Supreme Court must have been unaware of the decisions in the Supreme Court of the United States, when he referred to those decisions as being in the same line, whereas they expressly hold that the Act applies only to protect persons travelling upon the highway *at or near the crossing*.

It would strike one as strange, if a person travelling along a highway running in close proximity to the railway but not connecting with the crossing, and as to whom therefore in the absence of any statutory requirement, the obvious duty of the railway would be to avoid all unusual



noise, whether caused by steam cocks or the ringing of bells, or sounding of whistles, could maintain an action for not ringing the bell, when in truth as to him the only justification for doing so was that the engine was within the eighty rod limit, and the ringing of the bell or sounding of the whistle would otherwise give him a cause of action in case of injury.

Judgment.  
BURTON,  
J.A.

If *he* would have no cause of action by reason of such omission, why should a person much further removed have a cause of action, merely by reason of his being on a high-way leading to the crossing?

It is sufficient however for this case to say that there is no finding of the jury that the driver of the carriage would have refrained from coming down the hill even if the bell had been rung and there is no evidence which would have warranted such a finding, and the fanciful nature of any theory based upon the ringing or not ringing of the bell is apparent when we recollect that the crest of the hill was about 2,500 feet from the engine at the time the carriage reached it, and that the engine could not be seen until the carriage reached nearly the bottom of the hill.

I do not agree that any such construction can be placed on Rule 755 as contended for. We have on more than one occasion expressed our opinion upon this rule, and drawn attention to the difference between it and the English rule (order xl. rule 10) by which the Court is empowered to draw all inferences of fact not inconsistent with the findings of the jury. No such power is given under our rule; and even if there were, there are no facts here from which such an inference can be drawn. We may conjecture that if Dr. Sibbald had heard the whistle, which admittedly was sounded, he might have refrained from going down the hill; he does not say so, but the Court cannot assume the functions of the jury and supply findings which were for the jury if there was any evidence to warrant them.

It is in my opinion only in cases where the Judge at the trial for want of evidence could have granted a non-

Judgment.

BURTON,  
J.A.

suit, or directed a verdict for one side or the other, that the Court can exercise a similar power under this rule. See *Milissich v. Lloyds*, 36 L. T. N. S. 423.

One's sympathies are naturally aroused towards the unfortunate sufferers by an accident like the present, for accident I think it was, and greatly as I deplore their loss, I cannot help adding, to adopt the language of the Lord Chancellor in *Wakelin v. London and South Western R. W. Co.*, 12 App. Cas. 41: The jury in finding as they have done, that the death of the deceased woman was caused by the negligence of the defendants, have found it without a fragment of evidence to justify such a finding.

The appeals in both cases should, in my opinion, be allowed.

*Appeals dismissed with costs,*  
BURTON, J. A., *dissenting.*

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IN THE MATTER OF THE CENTRAL BANK OF CANADA.  
NASMITH'S CASE.

*Company—Banks and Banking—Winding-up Act—Shares, subscription for—Transfer of—R. S. C. ch. 120, secs. 20, 29, 70, 77.*

THIS was an appeal by Nasmith from the judgment of Statement.  
BOYD, C., reported 16 O. R. 293, and came on to be heard  
before this Court, [HAGARTY, C. J. O., BURTON, OSLER, and  
MACLENNAN, JJ.A.,] on the 25th and 26th of September,  
1890.

*A. C. Galt*, for the appellant.

*W. R. Meredith*, Q.C., and *F. A. Hilton*, for the  
respondents.

March 10th, 1891. The Court dismissed the appeal with Judgment.  
costs, holding that the main questions involved in the  
appeal were concluded by the judgment in *Baines's Case*,  
16 A. R. 237, and upon the points not fully discussed in  
that case agreeing with the reasons for judgment in the  
Court below and with those given in the judgment of the  
Master in Ordinary, reported 25 C. L. J. 238.

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## PAISLEY v. WILLS.

*Sale of land—Specific Performance—Want of title—Repudiation.*

A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground; but attempted repudiation on another ground does not keep this right alive, if the vendor at the proper time can make a good title.

Where a purchaser, who in an action by the vendor to compel specific performance, sets up in his defence that the contract was void because of fraudulent misrepresentations as to value, attempted at the trial to repudiate also on the ground of want of title in the vendor, he having known of this want of title for some time, and having because of it obtained an order for security for costs, it was held that there could not then be repudiation on that ground, and that it would be sufficient for the vendor to show title on the reference.

Judgment of the Common Pleas Division, 19 O. R. 303, affirmed.

## Statement.

THIS was an appeal by the defendant from the judgment of the Common Pleas Division, reported 19 O. R. 303.

The action was brought to compel the specific performance of a contract for the exchange of lands, and the defendant alleged in his defence that before action he had repudiated the contract because of the fraudulent misrepresentations of the plaintiff, and counter-claimed for rescission. The plaintiff was examined for discovery before trial, when it appeared that the land he had agreed to convey to the defendant stood in his wife's name, and the defendant thereupon applied for security for costs, the plaintiff being ordered to join his wife as a party plaintiff or to give security, and choosing the latter alternative.

The action came on for trial before FERGUSON, J., on the 29th of November, 1889, when the defendant asked for leave to amend by setting up that the plaintiff was not at the time the action was brought the owner of the land in question. This amendment, in spite of the objection that the application should have been made as soon as the facts were known, was allowed, an application thereupon made by the plaintiff for leave to add his wife as a party plaintiff being refused, and the action was dismissed with costs on the ground that the title was not in the plaintiff. The Common Pleas Division, however, on motion by the plaintiff to that Court, held that it was not open to the



defendant to repudiate on this ground at the trial, and ordered specific performance, subject to the trial of the question of fraud, a new trial being directed as to that. Statement.

The defendant appealed, and the appeal came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 16th of January, 1891.

*Bain, Q. C.*, for the appellant. There was no mutuality of contract at the time the contract was made. The plaintiff having no title to the land the defendant could not have obtained specific performance of the contract against him, and in such case the Court will not decree specific performance of the contract against the defendant. The Court below held that the plaintiff might maintain his action if he showed title upon the reference as to title even if acquired subsequent to the commencement of the action. It is submitted that such is not the law even when there has been no repudiation of the contract. The question is not one of title alone, but whether the plaintiff was the owner of the land as he represented himself to be when the alleged contract was entered into. The plaintiff sues as owner and not as agent for a third party. It being admitted that the plaintiff had no title it is submitted he had no right of action, and that the proper judgment was that pronounced by the learned Judge at the trial: *Wylson v. Dunn*, 34 Ch. D. 569; *Hoggart v. Scott*, 1 R. & M. 293; *Forrer v. Nash*, 35 Beav. 167; *Russell v. Romanes*, 3 A. R. 635; Fry on Specific Performance, 2nd ed., pp. 201, 203, 206. The defendant had, however, withdrawn from the contract before the commencement of the action. It is immaterial whether the withdrawal was on the ground of want of title or other grounds. When the plaintiff had no contract which he could enforce, it was open to the defendant to withdraw and repudiate, and the subsequent acquisition of title by the plaintiff, even if he had acquired it, would not entitle him to treat the contract as still existing and to enforce it against the defendant. The effect of the judgment of the Court below is, notwithstanding

Argument. the repudiation, to give him this right so long as title is shewn upon the reference directed, even although only acquired the day before the report upon the title is made.

*Shilton*, for the respondent. The objection is a purely technical one, and should not be given effect to. The defendant with full knowledge of the facts as to title went down to trial without pleading any defence except that of fraudulent misrepresentations, and has been rightly held debarred from now setting up a right to repudiate on a ground long before waived.

*Bain*, Q. C., in reply.

March 10th, 1891. HAGARTY, C. J. O. :—

In *Wylson v. Dunn*, 34 Ch. D. 569, Kekewich, J., quoting from Sir George Jessel, in *Commings v. Scott*, L. R. 20 Eq. 11, says : “ It cannot be doubted that so long as you have a contract binding the person who signs, it is immaterial that the person who signs is in fact an agent and not a principal, and that then having brought the contract within the Statute of Frauds, you may prove by parol evidence not only that there is a principal, but who that principal is.”

The same learned Judge says, p. 577 : “ If the contract is not mutually enforceable it is a voidable contract ; that is, it may be avoided as soon as the person who has the right to avoid it discovers that the cause or occasion for so doing occurs,” citing the rule in *Forrer v. Nash*, 35 Beav. 167, and *Brewer v. Broadwood*, 22 Ch. D. 105, where Fry, L. J., adopts the same view.

The same learned Judge also holds that the non-mutuality doctrine seems inapplicable, where the vendor tells the purchaser that he has then no title.

He also discusses the necessity of giving notice as soon as possible of the objection as to vendor's want of title.

Then in *In re Bryant*, 44 Ch. D. 218, (1889), Kay, J., lays it down that although the vendor had not in himself perfect title, he might get it in before the time for completing. He

then can enforce the contract, because he acquires the power to carry it out literally. "Of course, the Court would not put the parties through the idle form of conveying to the vendor, and the vendor conveying to the purchaser, when the very same thing might be accomplished by getting the person entitled to the outstanding estate or interest to convey direct to the purchaser."

Judgment.  
HAGARTY,  
C.J.O.

In that case it was held that the vendor could not compel the purchaser to make a new contract with the trustees who could obtain power to sell absolutely under the Settled Land Acts.

His decision was affirmed in appeal—the Court concurring in his views.

In *In re Head's Trustees*, 45 Ch. D. 310 (1890), on appeal from Chitty, J., the Court follows the view in *In re Bryant*, and also as to the right to repudiate on discovering that a good title cannot be made.

The remarks of Fry, L. J., may be read with profit.

I think the law is reasonably clear. 1. That there was a good contract between the parties under the Statute of Frauds; 2. That defendants on discovering that the title was not in the plaintiff, might have repudiated and rescinded the bargain with him on that ground; 3. That if this be not done, but if the only repudiation is on a wholly different matter such as fraud in misrepresentation of value, then if the vendor can at the proper time shew or give a good title it is sufficient.

The defence merely set up misrepresentations as to value and claimed rescission and cancellation of the contract.

The learned trial Judge allowed an amendment to the defence to the effect that the plaintiff had not at the time of making the contract any title or right to the land, nor when suit was commenced, nor at the time of the trial. This was strenuously resisted by the plaintiff.

It was shewn that the property belonged to the vendor's wife, and that he had tendered a conveyance thereof to the defendant before the action was commenced, but after the alleged repudiation on the ground of fraud.

Judgment.

HAGARTY,  
C.J.O.

The learned Judge seems to have considered that the defendant did not know of the plaintiff's defective title when the action was commenced.

But the defendant examined the plaintiff some weeks before the trial and then had full notice of the state of the title and that the plaintiff had authority from his wife to act for her in the sale.

On finding that the estate belonged to the wife, the defendant, on that ground, applied for and compelled the plaintiff to give security for costs.

The plaintiff offered to prove that when the bargain was made the defendant was informed it was the wife's property.

The learned Judge dismissed the action.

We are unable to agree with his views as reported to us, and we think the Divisional Court rightly reversed his decision.

I have only noticed some of the latest decisions on these points. In the Divisional Court many others are referred to.

I think Mr. Bain's argument that because he repudiated on one specific ground as to fraud, that he is in the same position as if he had done so also on the point of the plaintiff not being actual owner cannot be supported, and that the operation of such a doctrine would be most unfair to vendors.

BURTON, J. A. :—

I think that the judgment of the Divisional Court is correct and should be affirmed.

The proposition stated by Mr. Bain is no doubt correct, that where a person sells property which he is neither able to convey himself, nor has the power to compel a conveyance of from another person, the purchaser as soon as he finds that to be the case may repudiate the contract, but it is not applicable to this case.

The defendant did intimate his intention of repudiating



the contract on the ground of fraud, misrepresentation, and deceit—his right so to repudiate depended on his being able to substantiate the grounds on which he based it.

Judgment.  
BURTON,  
J.A.

He so far admitted the plaintiff's right to make the contract in fact, and relied upon the misrepresentations to avoid it.

He subsequently, and after the bringing of the action, discovered, as he alleges, for the first time, upon the examination of the plaintiff for discovery, that at the time of entering into this contract the title to the land stood in the name of the wife of the vendor, but the examination disclosed further, that the wife had executed a deed to the defendant. The defendant did not upon that discovery attempt to repudiate the contract on that ground, but he did at the trial ask to amend by setting it up in this way :

"The plaintiff had not at the time of the making of the contract sued on any title or right to the land to be given by him in exchange, nor had he such title at the time of the commencement of this action nor at the time of the trial."

I think myself the defence as pleaded is demurrable ; but Mr. Bain contends that having already intimated his intention to repudiate on the ground of fraud he is in the same position as if he had repudiated on this ground. That seems scarcely logical, but apart from the pleading it is, I think, clear upon the admission that repudiation upon this ground would not have availed him, the wife having conveyed and the land having been presumably all the time under the control of the plaintiff.

I think the court were right in the order made for a trial of the issue of fraud if the defendant desires it and that the appeal should be dismissed.

OSLER, J. A. :—

I think it manifest that the statement of defence upon the most liberal construction that can be given to it contains no sufficient allegation that so soon as the defendant discovered

Judgment.

OSLER,  
J.A.

that the plaintiff was not the owner of the land at the time of the contract he declined to complete the contract on that ground. The only repudiation alleged is on the ground of fraud, and it is open to the defendant to try that defence if he wishes to do so. It would be most unreasonable to permit him to amend now by setting up a repudiation of the contract on the other ground, for instead of so repudiating when he found that the plaintiff's wife was the owner of the land and not the plaintiff himself, he compelled the plaintiff to give security for costs and went on with the action to the trial. There seems, moreover, no reason to believe that he could prove a repudiation on this ground in fact. The parties then having gone to trial upon the merits, and no defence on this ground having been raised and the defendant having been made aware long before of the facts which might have entitled him to raise it, the plaintiff, subject to the trial of the issue of fraud, was entitled to a reference as to the title, and he might on such reference shew either that he was himself competent to convey, or that he could procure to be vested in the purchaser the legal and equitable estate free from encumbrances.

It appeared that there was a conveyance duly executed from the plaintiff's wife to the defendant ready to be handed over. The defendant, therefore, will probably have nothing to complain of. My brother Rose has so fully examined the cases, including that of *Wylson v. Dunn*, 34 Ch. D. 569, relied upon by Mr. Bain, that it would be waste of time for me to do so here. I agree with his reasons, and I think he has cited all the authorities. For these reasons and upon these authorities, I think this appeal should be dismissed.

MACLENNAN, J. A., concurred.

*Appeal dismissed with costs.*

## McCRAVEY V. MCCOOL.

*Partnership—Dissolution—Pending contract.*

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 19 O.R. 470, and came on to be heard before this Court, [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.,] on the 20th and 21st of January, 1891.

*McCarthy*, Q. C., and *M. J. Gorman*, for the appellants.  
*Aylesworth*, Q. C., for the respondents.

March 10th, 1891. The Court dismissed the appeal with costs, agreeing with the reasons for judgment given in the Court below.

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## SAWYER v. PRINGLE.

*Sale of goods—Conditional Sale—Default—Seizure—Resale—Right to sue for deficiency.*

After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due and that the vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine and resold it and after crediting the proceeds, brought this action to recover the balance of the original price:—

*Held*, [MACLENNAN, J.A., dissenting] that by the resale the original agreement had been put an end to and that the plaintiffs had no right of action.

*Per* MACLENNAN, J.A. The vendors became, in effect, mortgagees of the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance.

**Statement.**

THIS was an appeal by the plaintiffs from the judgment of the Chancery Division, reported 20 O. R. 111.

The action was brought by the plaintiffs, who were manufacturers of agricultural implements, to recover the balance of the price of a threshing machine sold by them to the defendant.

The agreement for sale contained the following clauses among others :

“ It is hereby agreed between the parties hereto, that the property in the said machine shall not pass from L. D. Sawyer & Co. to the said proposed purchaser until full payment of the price and any obligations given therefor, but the said proposed purchaser to have possession and right to use at once until any default in payment as aforesaid when the whole price or obligation therefor shall become due and payable, and in default of payment of price and obligation in full, L. D. Sawyer & Co. may resume possession which they may also do if any of the statements herein made are ascertained to be untrue, or if the said proposed purchaser become insolvent or permit executions against him to remain unsatisfied, or abscond or leave the machine unprotected, or when L. D. Sawyer & Co., deem it necessary to resume possession for other good cause.



"I, Alva N. Pringle, own and have a deed duly registered Statement. in my name of 100 acres of land, it being east half part of Lot No. 62, in the 1st B. S. concession township of North Marysburgh, in the county of Prince Edward, Province of Ontario, the current value of which is not less than \$3,000, and on which there is an incumbrance not exceeding in all the sum of \$1,000 to Chas. S. Wilson of Picton, and no interest or instalments are in arrears, and I will not sell or further incumber the same until all said notes or indebtedness to L. D. Sawyer & Co. is paid, and the said notes or any renewals thereof and said indebtedness shall be a charge upon said lands until paid, and I also own in my own name personal property not incumbered by chattel mortgage or otherwise, of the value of \$500 and am worth at least \$2,500 over and above all my liabilities, and there are no judgments against me."

The price of the machine was \$1,600, for which the defendant gave his notes. Default was made in payment of the first note and the plaintiffs seized the machine and sold it, suing the defendant for the difference between the original price and the price realized at the resale.

The defendant contended that there had been an agreement to renew the note, and that at all events the plaintiffs by resuming possession of the machine had put an end to the contract and could no longer sue for the price.

The action was tried before ARMOUR, C. J., on the 10th of May, 1890, who decided both points in favour of the defendant, and dismissed the action with costs. A motion by the plaintiffs against this judgment failed, BOYD, C., and ROBERTSON, J., differing in opinion, and the plaintiffs thereupon appealed to this Court—[HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.], the appeal coming on to be heard on the 28th and 29th of January, 1891.

*Hoyles, Q. C., and James Chisholm*, for the appellants. By the terms of the contract, the default in payment of the first note caused the whole purchase money to fall due

Argument.

so that when the plaintiffs took possession of the goods, the defendant was liable to pay the whole contract price and was in default. A sale is under the circumstances the ordinary and usual way of ascertaining the difference in value between the contract price and the goods in their then condition after the wear and tear while in defendant's possession, and the position of the plaintiffs as unpaid vendors warranted them in making the sale although there was no express clause to that effect contained in the contract: Benjamin on Sales, 3rd ed., secs. 1055, 1060, 1061, 1070, 1077; *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127; *Harkness v. Russell*, 118 U. S. 663. The case of *Lamond v. Davall*, 9 Q.B. 1030, relied upon by ARMOUR, C. J., does not support his judgment. The action in that case failed on a point of pleading, but had the action been framed upon the special contract, the plaintiff would have succeeded. There was no evidence to warrant the finding of the learned Chief Justice that the plaintiff promised to renew the notes.

*J. M. Clark*, and *C. H. Widdifield*, for the respondent. There was evidence to justify the finding as to renewal. The agreement in question contains no proviso authorizing the appellants after resuming possession of and reselling the machine to recover from the respondent the difference between the price of the machine and the sum realized from the sale thereof, and the appellants by so resuming possession and reselling the machine, have elected to rescind the contract, and have disentitled themselves to sue either on the contract or the note mentioned therein: *Lamond v. Davall*, 9 Q. B. 1030; *Hine v. Roberts*, 48 Conn. 267; *Loomis v. Bragg*, 50 Conn. 228; *Third National Bank v. Armstrong*, 25 Minn. 530; *Minneapolis Harvester Works v. Halley*, 27 Minn. 495. The fallacy of the plaintiffs' argument becomes apparent when it is considered that if it were correct, the plaintiffs might, in this case, have kept their machine, and also have recovered from the defendant the full price thereof.

*Hoyles*, Q. C., in reply.

March 10th, 1891. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,  
C.J.O.

[The learned Chief Justice stated the facts and continued:]

It seems clear that where the property has passed to the vendee and the vendor retakes the article sold out of the vendee's possession, the contract is not rescinded, and the vendee's remedy is by action of trespass or trover as against any wrongdoer. In this case the property remained in the vendors by the express terms of the contract.

Until default the defendant may retain possession, and among the specified defaults it is provided that the plaintiffs may resume possession if any statements in the contract are untrue; if the defendant becomes insolvent, or allows an execution to remain unsatisfied, or absconds, or leaves the machine unprotected, and for any other good cause that makes the plaintiffs desire to resume possession.

These terms, in fact, seem to leave it optional with the plaintiffs to resume possession at their pleasure. At all events, they may do so for causes wholly beside any default in payment.

This agreement cannot properly be called "a contract of sale." It is an executory agreement for a future sale on performance of certain named conditions by the defendant.

It seems much the same as if actual possession had always remained with the plaintiffs, though such a provision would probably defeat the whole object of the defendant in contracting to pay at distant days, relying on the earnings of the machine to meet his payments.

It may well be assumed that it was naturally in the contemplation of the parties that the subject matter of the bargain should continue to exist.

We may refer to Lord Blackburn's words in *Taylor v. Caldwell*, 3 B. & S., at p. 833: "There are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the con-

Judgment.

HAGARTY,  
C.J.O.

tract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done ; there in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

This seems to be certainly the general principle governing such contracts. See also *Turner v. Goldsmith*, 7 Times L. R. 233.

Where the contract contains this term as to resuming possession, we generally find this followed by a power given to the vendors to sell the chattel, either with or without notice, and to credit the proposed purchaser with the proceeds realized from the sale, leaving him expressly liable for any difference between that and the contract price.

In such a case the contract would undoubtedly not be rescinded.

If the plaintiffs here had merely exercised their right to resume possession and had then retained the machine ready for the defendant on full payment, it would also clearly remain in force.

If, without any default of the plaintiffs the property had been destroyed, as by accidental fire, it might be plausibly argued that the plaintiffs were not thereby debarred from recovering.

It would then be necessary to consider whether the case fell within Lord Blackburn's doctrine as to the destruction of the subject matter of the contract without any party's default.

The case before us raises, however, a wholly different question : the plaintiffs on resuming possession—or never having parted from the possession,—by their own voluntary act, sell the machine, thereby wholly disabling them-



selves from ability to perform their part, just as if they had purposely burned or otherwise destroyed the machine.

It must be borne in mind that it is a contract for a named specific chattel, and performance cannot be made by delivery of any similar or equally valuable article.

It seems rather a startling proposition that the plaintiffs, after such a proceeding, can still maintain the contract in its integrity, and recover a large sum of money, the price of an article which they have by their own act placed beyond their control.

If such be their right it must have existed if a month or a week after the defendant had the machine, and long before any default in payment, the defendant came within any of the specified matters in the contract—becoming insolvent or allowing an execution to remain unsatisfied, or leaving the machine unprotected, or any other good cause in plaintiffs' opinion, and the latter had resumed possession and sold the machine. They would thus get back the article and yet be entitled to recover the whole purchase money.

I may say in the words of Cockburn, C. J., in another case, *Martineau v. Kitching*, L. R. 7 Q. B. at p. 450: "Unless there are authorities absolutely conclusive upon the point, I will not give way to a rule which appears to me to militate against principle, and to be inconsistent with common sense and convenience."

In the case of resuming possession, just referred to, the plaintiffs might have excellent reasons for treating the breach of condition as giving them the right to rescind the contract. This is what defendant here claims to be the effect of the plaintiffs' course.

No direct authority is cited to us in any English case.

Several American cases favour the defendant's contention. There is an elaborate judgment in the Supreme Court of the United States, *Harkness v. Russell*, 118 U. S. 663, but it turns chiefly on the inability of a bailee of chattels under a contract of this kind to convey title to a third party until performance of the conditions on which the agreement to sell is made.

Judgment.

HAGARTY,  
C.J.O.

Judgment.

HAGARTY,  
C.J.O.

The judgment is very full and instructive. A contract like that before us was held to be not a mortgage, but an executory conditional sale, and in the absence of fraud valid between the parties.

*Third National Bank v. Armstrong*, 25 Minn. 530. The contract is somewhat like this, but was contained in an instrument containing a promissory note payable in some seventeen months for a reaper. The note was transferred to the plaintiffs for value and they sued the maker.

It was held not to be a negotiable note—also that “if prior to any default the company had retaken possession of the property and disposed of it, so that on maturity of the defendant’s promise an observance of the condition had become impossible, there can be no doubt that no action could be maintained against him on his promise.”

The promise to pay and the implied obligation to transfer the title were held to be mutual, each the sole consideration for the other concurrent condition, each depending on the other.

In that case there was the right to resume possession but no provision as to sale.

*Minneapolis Harvester Works v. Halley*, 27 Minn. 495. There was the right to retake possession, sell and apply proceeds to pay the defendant’s note. Title not to pass till note paid.

The plaintiffs took possession and sold—it is not stated whether before or after default. The Court held (citing the last case) that there was a total failure of consideration. The action was to recover the balance due on the note given for the machine, with the condition attached. The defendant not only never acquired any title or right of possession but by the plaintiffs’ act had been deprived of his power of acquiring any by payment of the price.

*Hine v. Roberts*, 48 Conn. 267. The contract was peculiar, the defendant agreeing that if the organ was retaken by the plaintiff all his rights thereto and to the money paid by him would be forfeited and his claim relinquished, and the organ going back to the plaintiff’s possession, it was

held on the terms of the contract that the defendant was not liable to pay the note he had given. Judgment.

*Loomis v. Bragg*, 50 Conn. 228. A piano was hired at a named price, \$5 down and \$5 per month till all paid, then to become the defendant's property. If default made, the plaintiff could retake, and all the defendant's rights were to cease and the money to belong to the plaintiff. Held, the plaintiff's remedy was solely to retake and hold all money paid, but no right to sue for the remaining sum. There could be no claim for damages other than the instalments paid, and these the plaintiff already had. HAGARTY,  
C.J.O.

According to the spirit of these American decisions, it would seem that in a contract like that before us, if the plaintiffs not only resume possession, but sell or destroy the subject matter of the contract, they lose their remedy for the portion of the purchase money still unpaid—at all events that portion which is not in default—retaining in their hands the money already paid.

It was certainly natural that when the defendant found the plaintiffs selling the specific chattel, the subject of the contract for which he had given his notes, and thus debarring themselves from ever giving it to him, that he should consider his liability at an end.

Lord Blackburn says in *Mersey Steel Company v. Naylor*, 9 App. Cases at p. 443: "The rule of law, as I always understood it, is that where there is a contract in which there are two parties, each side having to do something (it is so laid down in the notes to *Pordage v. Cole*, 1 Wms. Saund. 548,) if you see that the failure to perform one part of it goes to the root of the contract, goes to the foundation of the whole, it is a good defence to say 'I am not going to perform my part of it when that which is the root of the whole and the substantial consideration for my performance is defeated by your misconduct.'" /

In the same case (at p. 438) Lord Selborne uses like language, adopting Lord Coleridge's words in *Freeth v. Burr*, L. R. 9 C. P. 208: "You must look at the actual circumstances of the case to see whether the one party

Judgment.

HAGARTY,  
C.J.O.

to the contract is relieved from its future performance by the conduct of the other ; you must examine what that conduct is, so as to see whether it amounts to a renunciation, to an absolute refusal to perform the contract, such as would amount to a rescission if he had the power to rescind, and whether the other party may accept it as a reason for not performing his part."

In Benjamin on Sales, 3rd ed., there is a discussion as to the power of resale and a review of the cases. At sec. 1057 *Lamond v. Davall*, 9 Q. B. 1030, (discussed in the Court below) is commented on. In this and most of the other cases the property had passed, and it was held that where there was the power to resell on default the original sale was rescinded, and any action should be special for loss of time or expenses and not on the original sale. When there is no express reservation of the right to sell—the effect of a resale not being to rescind the sale—the goods are sold by the unpaid vendor, *quâ pledgee*, and as though the goods had been pawned to him—they are sold as being the property of the buyer who is, of course, entitled to the excess if they sell for a higher price than he agreed to pay.

Some of these authorities seem to me to govern a case like that before us, where no property, title, or right, has passed ; where the contract is wholly conditional, that on a future performance by the defendant of named conditions the plaintiffs will sell and deliver to him a specified chattel. The distinction between the two classes of cases is most substantial.

I find no precedent for reversing the decision appealed against, and I am most reluctant to join in making one.

BURTON, J. A. :—

If I could bring myself to the conclusion arrived at by one of my learned brothers that the relationship of mortgagor and mortgagee existed between these parties, I should probably have no difficulty in arriving at the same



result as he has, but that, as it appears to me, is what they have studiously avoided. They have on the contrary refrained from making any absolute contract of sale, reserving possession merely till payment, but have entered into a peculiar contract under which no sale is to be considered as made until full payment of the price.

Judgment.

BURTON,  
J.A.

Where there has been a sale, the authorities seem very clearly to establish that where there is no express reservation of a right to resell, such a sale by the vendor is a mere tortious act for which the purchaser has his remedy, but it has no effect as a rescission of the contract. Where, however, there is such reservation to resell on default, and the vendor exercises that right, it operates as a rescission of the original sale; and this rule applies whether the goods are from the first in the possession of the vendor or are retaken from the purchaser after their delivery to him.

If, therefore, in this case the property as well as the possession of the goods had passed to the defendant, the act of the plaintiffs in reselling would have been tortious, but would not have prevented them from recovering on the notes.

The defendant might have had a remedy for any loss he sustained by a special action on the case, but not an action similar to the former action of trover as he had no right of present possession, and that of course under the present system could have been raised by counter-claim.

I do not agree with one of the learned Judges in the Divisional Court that the resuming possession, which by the very terms of the agreement was authorized, operated as a rescission of it, on the contrary, they were entitled both to hold that security and to enforce the notes.

But those cases have very little application to the one we are considering.

Here there was no sale strictly so called; there was an executory and conditional contract of sale—that sale would become absolute and the property pass only on fulfilment of the conditions. Default was made by the purchaser and the vendors exercised their undoubted right of resum-

Judgment.

BURTON,  
J.A.

ing possession, but having sold the property which was the subject of the agreement, have they not put it out of their power to fulfil their contract? They could not fulfil that contract by substituting another machine of a similar make and material.

There seems to me to be a wide difference between the present case and those in which without authority the vendor has sold the purchaser's property. In such a case the purchaser has a remedy but what remedy would the defendant here have if this defence cannot be maintained? The property is not his; he can have no action for the conversion of property which belonged to the plaintiffs; by resuming possession they were within their rights; from that time they held it in security for the payment of the debt, and ready, presumably, for delivery to the defendant, if they still desired to hold him to his contract, on payment of that debt; but being their property, they had the legal power to sell; when, therefore, the defendant became aware that the plaintiffs had elected to sell it, he was entitled to believe that they had elected to abandon this contract, and he had, I think, a clear right to acquiesce in that and do so also.

✓ If the plaintiffs desired to hold the defendant to his contract, they were bound to hold the machine for delivery to him on payment; when they disabled themselves from doing so, the defendant was, I think, entitled to repudiate the contract also.

✓ I think that the judgment at the trial was right, and the appeal must be dismissed.

OSLER, J. A.:—

All the cases cited from the English text books and reports which are relied upon by the plaintiffs as establishing their right to sue upon and recover the amount of the promissory notes given by the defendant, are cases in which the property in the goods sold had passed to the purchaser under a contract of sale, accompanied or not with the reservation to the vendor of an express power of resale.

These cases, or most of them, were reviewed in *Page v. Cowasjee Eduljee*, L. R. 1 P. C. 127; 3 Moo. P. C. N.S. 499, in which it is clearly laid down that the tortious taking of the property out of the hands of the vendee, and the tortious resale thereof by the vendor, does not operate a rescission of the contract of sale, but that the vendor may notwithstanding, recover the unpaid price; and is, on the other hand, subject to a cross action by the buyer for damages for the wrongful sale.

Judgment.

OSLER,  
J.A.

The rules of law relative to resales by vendors where the vendee is, or is not, in default, and in the absence of or under the authority of an express reservation of the right, are summarized in Benjamin on Sales, 4th ed., pp. 803, 804. The authorities from which these rules are deduced deal with cases in which there has been an actual sale to the original purchaser, so that the property in the goods has passed to him, accompanied or not by delivery of possession. Two cases may be cited which set the matter in a very clear light. The first is *Stephens v. Wilkinson*, 2 B. & Ad. 320. The action was on a bill given for the price of goods sold, and the defence was that the plaintiff had tortiously retaken the goods from the defendant after the delivery. It was held that this was no defence, and that the vendee's remedy was an action of trespass. Parke, J., said: "No case has been cited, and no dictum, which confirms the position that the retaking of the goods by the vendor may be treated by the vendee as a dissolution of the contract. If the goods are delivered by the vendor, and taken possession of by the vendee, his title to them is complete; the consideration for the price is then perfect. \* \* In point of law the situation of the parties is this: the vendee has had all he was entitled to by the contract of sale; and he must therefore pay the price of the goods. He may bring trespass against the vendors for taking possession of them again, and may recover the actual value of the goods at the time they were taken."

The other case is *Chinery v. Viall*, 5 H. & N. 288.

Judgment.

OSLER,  
J.A.

That was an action by the buyer against the vendor who had tortiously resold the goods before delivery, the buyer apparently not being in default.

The plaintiff sued on the contract for non-delivery, and also in trover for the value of the goods sold. On the latter count he recovered the whole value of the goods; and the question was, whether the verdict should be reduced by the amount of the unpaid price. This was decided in the affirmative, on the ground that, as the vendor could not, by reason of his conversion before delivery, maintain a cross action for the price it must be allowed in calculating the damages, for otherwise the buyer would get the goods for nothing.

*Maclean v. Dunn*, 4 Bing. 722, and *Acebal v. Levy*, 10 Bing. 376, shew that where the goods remained in possession of the vendor who resold them, the vendee being in default, the vendor was entitled to recover the unpaid price, or damages equal to the unpaid price, in an action of assumpsit for not accepting and paying for the goods.

The difference between such cases and the one at bar is very great, the leading distinction in all of them being that the vendor in reselling was dealing with property which was no longer his, but his vendee's. That was even the case in *Lamond v. Davall*, 9 Q. B. 1030, although there the original sale was a conditional one to this extent that a right of resale was reserved.

Here the agreement between the parties is an executory one; merely a contract, as Lord Blackburn says, to transfer the property in consideration of the purchaser actually paying the price and not merely of his engagement to do so: Blackburn on Sale, 2nd ed., p. 171. No interest in the subject matter was vested in or could be acquired by the defendant until payment of the price in the stipulated manner: until payment it remained the property of the plaintiffs. The temporary or revocable character of the possession which the defendant acquired under the agreement can, it appears to me, make no difference in this respect. It was collateral to the main object of the agreement, and may



therefore be disregarded in considering the rights of the parties in the events which subsequently happened. In other words I think the case must be looked at as if the possession had always remained with the vendor.

Judgment.

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OSLER,  
J.A.

The defendant then having made default the plaintiffs sold to some one else the specific article which they had agreed in the happening of a certain event to sell to him, and the consequence is, that they have by that act deprived themselves of the power of ever carrying out their agreement with him.

Still they contend that he must carry out the agreement on his part, and pay them the price, though he can never get the property in or possession of the thing he agreed to buy.

We are in danger of being misled by a false analogy if we compare this case to one in which there has been an actual sale, and then a resale by the unpaid vendor, who sells the goods *quâ pledgee*, as being the property of, and as though they had been pawned to him by, the vendee. The case, on the contrary, is one where there is an express contract which governs the rights of the parties, and in which the plaintiffs have been careful to exclude the possibility of the goods being treated for any purpose as the goods of the defendant, until the price shall have been paid.

I do not think that the fact of default having been made in payment of the notes is a material one. The question of the plaintiffs' right to recover the price is the same as it would have been if they had sold the machine before any default, or before the defendant had paid anything on account of the purchase money. To maintain their contention the plaintiffs are obliged to assert that, notwithstanding the terms of their contract with the defendant, the property was equitably his; that they wrongfully sold it, and that he has some remedy against them in damages for their wrongful act, his damages being measured by the price realized on the sale; while they are left free to insist upon payment according to the terms of his agreement with them. I do not think the plaintiffs can

Judgment.

OSLER,  
J.A.

take that position. It does not lie in their mouths to say that the sale was a tortious one, or a sale of the defendant's goods. If the property was not the defendant's, and the plaintiffs were careful to stipulate that it should not be his until payment of the price, then the subsequent sale was not wrongful, being one of the plaintiffs' own property. Where there has been an actual sale, and the property has passed, nothing can alter the fact. The purchaser has got what he bargained for and must pay the price, and if his property is wrongfully sold by the vendor, or anyone else, he has his appropriate remedy. There is no rescission, nothing to stop either party. But here the plaintiffs would blow hot and cold. By the terms of our agreement they say, the property remained ours and did not pass to you. Yet it was yours and we wrongfully sold it, or sold it as yours, and, while we are answerable to you for that, you must pay us the stipulated price. If the defendant has an equity against the plaintiffs it is for him to set it up. If he does not, the plaintiffs shall not set it up for him so as to prevent him from alleging what is in my opinion a good defence, namely, that the plaintiffs have, by their own act, disabled themselves from performing their agreement with him, and that the consideration for the notes has thus wholly failed.

The case in short may be summarized thus: The plaintiffs are trying to compel the defendant to pay the price of an article which they agreed in a certain event to sell to him. By the express terms of their contract it was not to become his property till he paid for it. The plaintiffs have now disabled themselves from selling it to him, and yet say he must pay the price, because, notwithstanding the terms of the contract, it had, when they disposed of it, in some way or other become his. I think that if the defendant chooses to take the position, he has the right to hold the plaintiffs to the terms of their bargain and to refuse to pay for what he can never compel the plaintiffs to give him. This view accords, I consider, with the substance of the American decisions cited.

The case of *Harkness v. Russell*, 118 U. S. 663, appears to decide nothing more than has long been settled in our Courts, in such cases as *Stevenson v. Rice*, 24 C. P. 245; *Mason v. Johnson*, 27 C. P. 208; *Tuffts v. Mottashed*, 29 C. P. 539; *Mason v. Bickle*, 2 A. R. 291; *Nordheimer v. Robinson*, 2 A. R. 305; viz., that a person in whose possession an article has been placed under a like contract to that here in question, cannot give a title to a third party as against the bailor. As Gwynne, J., says, the defendant at most had possession of the plaintiffs' property upon bailment, if not as rent, still only under an agreement whereby by paying for it he could make it his own; the property was not to pass until payment. See also *Frye v. Milligan*, 10 O. R. 509; *Ex parte Crawcour*, 9 Ch. D. 419; *Ex parte Rawlings*, 22 Q. B. D. 193.

Judgment.

OSLER,  
J.A.

I think the judgment at the trial right, and that the appeal should be dismissed.

MACLENNAN, J.A.:—

I am unable, with great respect, to come to the same conclusion on this appeal as the other members of the Court.

I think it is quite clear that it was not the intention of the parties, and that it is not the meaning of the deed out of which this action has arisen, that the taking possession by the plaintiffs of the machine in question, was to have the effect of rescinding and putting an end to the contract. On the contrary, it is evident that the plaintiffs were still to be paid their money even if they resumed possession of the chattels. The purchaser was to have possession and right of user at once until any default in payment, but if any such default occurred the whole price was to fall due and payable, *and* the plaintiffs might resume possession. That clearly contemplates that they could resume possession, and also proceed to recover the full price. The possession therefore was to be resumed for the protection and security of the plaintiffs, and to secure them in the only thing which concerned them, namely, the payment of the

Judgment.  
MACLENNAN,  
J.A. price agreed upon. And this shews that it was for the same purpose, and not as a condition, that it was stipulated that the property in the chattels should remain in the plaintiffs. They were to have the security of the property in the goods from the beginning, and they reserved the right in case of any default to add the possession to the property, for the same purpose. But that was not the only security they stipulated for, for the defendant by the same deed expressly mortgages to the plaintiffs 100 acres of land as a security for the purchase money, which is in that connection described as an indebtedness.

I think, therefore, with great respect that the moment the chattels were delivered to the defendant, and that he delivered to the plaintiffs his notes for the price, the relation of mortgagor and mortgagee arose between the defendant and the plaintiffs, both in respect of the chattels and the land, and that from that time their legal and equitable rights must be determined by the principles applicable to that relation.

It is very familiar law that in mortgage cases the form of the transaction is immaterial; it is sufficient, if a transaction relating to lands or goods was for the purpose of security, to make it a mortgage. If this instrument had been in relation to a parcel of land instead of a chattel, it would, as I think, be too clear to admit of any question or discussion. Instead of making a conveyance and taking back a mortgage a vendor and vendee of land might execute just such an instrument as we have here, and I suppose no one would doubt that it would be a good legal mortgage, and that the rights and liabilities of the parties would be determined accordingly.

Therefore, as I humbly think, the defendant in this case could have come at any time after default, and after the plaintiffs had resumed possession of the chattels, and by payment of the price have redeemed both the chattels and his land, and in case of refusal would have been entitled to the aid of the Court to compel redemption.

If that is so, then the plaintiffs were in reality mort-



gagees of the chattels, just as they were mortgagees of the defendant's land, and the defendant was in equity the real owner of both.

Judgment.

MACLENNAN,  
J.A.

It must be conceded that up to the time, at all events, of the sale made by the plaintiffs, the defendant would have had no defence at law or in equity to an action for the debt. The right of action had accrued upon the first note, and by reason of his default in paying that, also upon his covenant for payment of the whole debt, and I am unable to see how the wrongful act of selling the goods could afford a defence. A refusal to deliver possession in the first instance as provided by the contract might have been such a defence, but I can not understand how a sale of the goods after possession resumed for default, a wrong totally unconnected with the covenant, and done after the action on the covenant had accrued, could be pleaded in confession and avoidance. If it could not be pleaded at law, it is clear that neither could it be set up as a defence on equitable grounds. In equity the chattels belonged to the defendant, and if the plaintiffs sold them wrongfully the redress afforded by a Court of Equity would not be by declaring a forfeiture of the debt, but by decreeing compensation for the loss or damage, if any. The defendant would be left to pay his debt with a deduction for the value of his goods made away with, or sold by the plaintiffs.

If the principle on which the judgment is rested in the Court below is sound, then if the sale had been made after judgment was recovered for the debt, the defendant would be entitled to restrain the enforcement of the judgment, and to recover back what he had paid.

If I am right in the view which I take that the plaintiffs were really mortgagees of the chattels as well as of the land, all difficulty disappears. It was a legal mortgage, the property was in them, and they also had the possession. It was contended before us that in the absence of any stipulation in the contract authorising them to sell, the sale was illegal and tortious. But that is not so. It

Judgment.  
MACLENNAN, J.A. is well settled law that a mortgagee of chattels without express power of sale is not obliged to foreclose, or to apply to the Court for a judgment to enable him to realise his debt by a sale. He may himself sell after the day fixed for payment has elapsed, or after demand where no day for payment has been named: Fisher's Law of Mortgage, 4th ed., pp. 453, 454; Smith's Real and Personal Property, p. 375; Coote's Law of Mortgages, 5th ed., pp. 282, 653, 475; Story on Bailments, 9th ed., secs. 308, 309; Story's Equity Jurisprudence, 13th ed., sec. 1031; 2 Spence, Equitable Jurisdiction, p. 637; 4 Kent's Commentaries, 12th ed., p. 138; *Tucker v. Wilson*, 1 P. Wms. 261; *S. C.*, 5 Br. P. C. 193; *Coggs v. Bernard*, 1 Sm. L. C., 9th ed., 201.

The rule is different with regard to land; a mortgagee of land cannot sell the estate without express power, until after foreclosure. If he sells after foreclosure he sells as owner, and not as mortgagee, and is deemed conclusively to have taken the land in satisfaction of his debt.

Finding it impossible to perceive any other object or purpose the parties could have had in making the stipulation that the property in the chattels should not pass until full payment, than that they should be and remain a security for the debt, I am, with great respect, of opinion that the plaintiffs thereby became mortgagees of the chattels in question, and had a right to sell them, and to apply the proceeds to their debt, and that they have also a right to recover the deficiency from the debtor.

*Appeal dismissed with costs,*  
MACLENNAN, J.A., *dissenting.*

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## McINTOSH V. MOYNIHAN.

*Sale of land—Statute of Frauds—Proposal of contract—Acceptance—  
Memorandum in writing.*

An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the Statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.

*Per* OSLER, J. A., (dissenting) such an instrument is a proposal to sell to any one who accepts the offer.

THIS was an appeal by the plaintiff from the judgment of *Statement*.  
FALCONBRIDGE, J.

The defendant Moynihan had consulted one Armstrong, a real estate agent, as to the sale of certain land owned by him, and the price and terms of sale had been discussed between them, but had not been definitely settled. Armstrong then endeavoured to find a purchaser, and one Frogley expressed his willingness to give a certain price for the land. Armstrong then prepared, and obtained the signature of Moynihan to, the following agreement, and paid him \$15, Moynihan at the time being, as alleged in his defence, intoxicated and not in a condition to understand what he was doing :

"I hereby offer and agree to purchase from John Moynihan, through Carr & Armstrong, agents, his property on the south side of St. Clair avenue, township of York, between Vaughan road and Christie street, being composed of lots Nos. 15, 16, 17, 18, 19 and part of 36, plan 119, having a frontage on St. Clair avenue of 7 chains and 23 links by a depth throughout of 6 chains and 15 links for the sum of fourteen hundred dollars (\$1,400) per acre under the following conditions. That is to say, on the title being satisfactory, will pay down one thousand dollars (\$1,000), assume a mortgage of \$2,500 now standing against said property, and give a second mortgage on said property for balance for three years, to bear interest at six per cent. per annum, and whenever any portion of the above mentioned is sold, that such portion shall be released

Statement.

from said mortgage on payment of proportionate amount in full, and that the whole or any portion of the moneys secured by said second mortgage can be paid off at any time without notice or bonus. Taxes and interest to be apportioned up to date of final closing, and that I shall have twenty days to search the title, and it is further agreed that the vendor shall pay all claims of present mortgage in the shape of bonus.

Dated this 1st day of April, 1889.

Witness—J. D. ARMSTRONG.

C. J. FROGLEY.

I hereby accept the above offer, and agree to all the conditions contained therein.

And acknowledge the receipt of fifteen dollars on account of the same.

Witness—J. D. ARMSTRONG.

JOHN MOYNIHAN."

At the time Moynihan signed the so-called "acceptance," Frogley had not signed the offer, and his name was not mentioned to Moynihan. Frogley, however, on the next day, signed the so-called "offer." A few days later, Moynihan agreed to sell the same lands to the defendant Harrington, and the agreement for sale was immediately registered. After this transaction and with knowledge of it, the plaintiff bought Frogley's interest, and brought this action to enforce specific performance by Moynihan of the alleged agreement with Frogley, and to have the agreement with Harrington cancelled.

The action was tried before FALCONBRIDGE, J., at Toronto, at the Autumn Assizes of 1889, who dismissed the action with costs, mainly on the ground of the incapacity of Moynihan through intoxication, but intimating also that he thought the plaintiff a mere "prowling assignee" and not entitled to specific performance, and that Harrington was protected as a purchaser for value without notice.

The plaintiff appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 4th and 5th of February, 1891.



*Bain*, Q.C., for the appellant. Harrington had notice of Argument. the agreement with Frogley and the prior registration of his agreement does not protect him: *Rose v. Peterkin*, 13 S.C.R. 677; *Forrester v. Campbell*, 17 Gr. 379. Having notice the agreement may be specifically enforced as against him: Fry on Specific Performance, 2nd ed. p. 94; *Devine v. Griffin*, 4 Gr. 603. Harrington cannot set up Moynihan's incapacity as a defence: *Shaw v. Thackray*, 1 Sm. & G. 537.

*J. E. Robertson*, for the respondent Moynihan. There was no sufficient agreement to satisfy the Statute of Frauds. Frogley's name is not mentioned in the acceptance, and to make the memorandum sufficient it must be a memorandum of an actually concluded bargain: *White v. Tomalin*, 19 O. R. 513; *Munday v. Asprey*, 13 Ch. D. 855; *Potter v. Duffield*, L. R. 18 Eq. 4; *Jarrett v. Hunter*, 34 Ch. D. 182; *Williams v. Jordan*, 6 Ch. D. 517; *Rossiter v. Miller*, 3 App. Cas. 1124. The plaintiff knew of the sale to Harrington before he purchased and was merely speculating in the result of a law suit. The discretionary power of granting specific performance should not be exercised in his favour: Fry on Specific Performance, 2nd ed., secs. 368, 369, 380, 381, 382, 384, 396.

*Oliver Macklem*, for the respondent Harrington. Harrington is a purchaser for value without notice, and is protected. The finding of the trial Judge as to the incapacity of Moynihan should not be interfered with. Harrington is entitled to set that incapacity up as a defence. In *Shaw v. Thackray*, 1 Sm. & G. 537, there was actual fraud, which is the distinguishing feature. There is a discretion to refuse specific performance: *Clowes v. Higginson*, 1 V. & B. at p. 527.

*Bain*, Q. C., in reply.

Judgment. March 10th, 1891. HAGARTY, C. J. O.:—

HAGARTY,  
C.J.O.

The case seems to stand thus: Armstrong draws up, after ascertaining that the required price could be obtained, the agreement from some person not named or in any way referred to as a proposed purchaser, a general offer which anyone may sign.

Moynihan signs the acceptance. There is nothing whatever to shew, or even to guess at, any person as the vendee. It amounts to this, "I am willing to sell my property on certain written conditions."

Armstrong pays down \$15 on account. He was hardly doing that as Moynihan's agent; it could only have been on behalf of Frogley his undisclosed principal, for whom he effected the sale a few days after to the plaintiff.

It could hardly be regarded as a binding agreement so long as it was unsigned by any vendee.

Armstrong says he looked upon it as not completed before Frogley signed.

Harrington, the second defendant and the subsequent purchaser from Moynihan, had called to enquire about the property before Frogley had signed.

Mr. Bain argued that it was sufficient under the Statute of Frauds, as it was done through the agent Armstrong acting for the vendor, and was given to him to complete by binding the vendee.

I hardly see how anything done by Armstrong, as the defendant's agent, can affect the objection of the alleged written contract not in any way shewing with whom the bargain was made.

If the offer had been that of Frogley as the person making the same, the case would be far stronger for the plaintiff.

The act of the agent leaves the legal obligation of Moynihan under the statute just where the writings leave it.

I think the case cannot be put stronger against Moynihan than if he had signed a memorandum to the effect that he was willing to sell his specified property at a named price.

Is the statute satisfied by any person writing at the foot thereof, "I accept the above offer, and agree to all the conditions therein?"

Judgment.

HAGARTY,  
C.J.O.

We are not asked to discuss the point whether it would be good if he had said, "I will sell to any person who may accept this offer in writing." That would raise a different question as to whether a vendee would not be sufficiently designated by this general offer to any one who would accept.

Must not the parties be brought together after the intending vendee offers or binds himself or declares his willingness to purchase, so that the vendor elects to accept him as vendee? Otherwise some wholly objectionable person might be forced upon him as buyer, one whom he would not wish to deal with, or to be his neighbour, etc.

As already remarked, the defendant has not written his readiness to sell to any person who will accept his offer. This subject is discussed in *In re Agra and Masterman's Bank*, L. R. 2. Ch. 391, by Lord Cairns. See Pollock on Contracts, 5th ed., p. 11 *et seq.*; p. 19 *et seq.*; *Williams v. Byrnes*, 1 Moo. P. C. N. S. at p. 198.

But in the absence of anything to open up the question as to an offer being addressed to all the world, I think it may be assumed that the statute, as construed by authority, requires in a contract for the sale or purchase of property that it must appear, by name or some explicable term such as "proprietor," "owner," etc., with whom the bargain is to be.

This requirement, as Lord Blackburn says in *Rossiter v. Miller*, 3 App. Cas. 1124, "is inveterate." The writing must shew who the parties are, though they need not be named.

Sir Geo. Jessel's discussion of this point, when the same case was before him in the first instance, is very full and instructive. See also Anson on Contracts, 4th ed., p. 31 *et seq.*

The subject is fully discussed in *White v. Tomalin*, 19 O. R. 513, in our Chancery Division. It seems to me to

Judgment. be undistinguishable from the present case as to the necessity of there being in the writing signed by the person to be charged, a vendee or person described in some ascertainable manner, with whom the contract is made.

HAGARTY,  
C.J.O.

I have examined the authorities there cited and many others and have come to the conclusion that in the present state of the law there is no sufficient contract to charge the defendant Moynihan.

This view of the case renders it unnecessary to discuss any of the other questions raised as to the position of the defendant Harrington.

I think we should not in any way relax the wise provisions of the Statute of Frauds as to these contracts.

The general facts in evidence before us induce me at least to feel anything but regret that we can hold there was no binding contract.

BURTON, J. A. :—

The written memorandum signed by the defendant Moynihan, was not, at the time it was signed, a sufficient memorandum in writing to satisfy the Statute of Frauds.

If the name of Frogley had been inserted in the offer, then the memorandum signed by Moynihan, would have been sufficient to bind him, though the contract itself had been concluded by a mere parol acceptance subsequently.

It is contended that, although insufficient at that time, Mr. Armstrong, who was agent for Moynihan to effect the sale, by obtaining Frogley's signature to the offer subsequently, cured the defect. It appears to me that the answer to that contention is, that, although if the memorandum had been drawn, as I have suggested, even the verbal assent would have been sufficient to make a good contract, it still had to be evidenced in writing, signed by the party to be charged, to satisfy the statute, and that this was never done, it being clear that Moynihan never acknowledged his signature after the document was perfected, and Armstrong having no authority to bind him by



a contract in writing, could not have bound him even if he had professed to do so.

Judgment.

BURTON,  
J.A.

It was not necessary that it should be signed by Frogley to make it a valid contract, although it could not have been enforced against him, not because it was not a good contract, but because it was incapable of proof; if, therefore, on receiving Mr. Frogley's assent, Mr. Armstrong had inserted his name in the offer without procuring a re-acknowledgment of the signature of the defendant, it seems to me that the contract so altered could not have been enforced.

I am of opinion, therefore, that there was no sufficient memorandum to satisfy the statute.

If this view of the memorandum be correct, it becomes unnecessary to consider the other objection as to the defence of drunkenness. I think it wholly fails upon the evidence; there being nothing to show that he was in that state when he signed the document, and Mr. Armstrong denies it.

The present contest is between an assignee of the contract, who had full knowledge, when he purchased, of the subsequent sale to Harrington, who, on the other hand, is alleged to have had notice of the contract with Frogley. Whether that in itself was sufficient to warrant the learned Judge, in the exercise of his discretion, to refuse specific performance, in the view I take of the case it is not necessary to determine. It is no doubt said that it is in the discretion of the Court; but that does not mean an arbitrary discretion; and as a general rule if the contract has been entered into by a competent party, and is unobjectionable in its nature and circumstances, specific performance is as much a matter of course, and, therefore, of right, as an action for damages: *Hall v. Warren*, 9 Ves. 605.

I place my judgment, however, on the ground that the memorandum is not sufficient under the statute.

I, therefore, think that the appeal should be dismissed.

Judgment. OSLER, J.A. :—

OSLER,  
J.A.

The agreement of which the plaintiff as assignee seeks specific performance is on its face a valid one. The offer signed by the purchaser mentions the owner by name, and the subject matter and terms of sale are specified. Then the acceptance incorporates the offer by reference and is signed by the person to whom the latter purports to be made. It appears, however, by the parol evidence introduced by the defendant that the acceptance was signed first and that the vendor (Moynihan) did not know by whom the offer was to be signed, though he knew that such an offer had been made verbally by some one and that the offer referred to in his acceptance was to be signed by that person. The circumstances are most unusual but I think we have here a good enough contract.

Taking the instrument in the form in which it was when Moynihan signed it, it was I think a proposal to sell to any one who would sign the offer. It was more than a mere general invitation to make a proposal to be considered by him. It was the proposal of a contract with any one who would enter into those terms and evidence it by signing the offer embodied in the acceptance. It is more like the case of the offer of a reward than anything else. "Sign that offer," says the vendor, "and I will sell to you, whoever you may be who shall do so;" and he entrusts it to his agent to bring it to the notice of the public, for so far as he was concerned it was only one of the public who had made it. C. J. Frogley signs the offer in fulfilment of the proposal, and hands it to the vendor's agent. I think there are all the elements of a valid contract, evidenced in such a way as to satisfy the requirements of the Statute of Frauds.

I refer to Anson on Contracts, 4th ed. p. 31: "An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by an ascertained person." And in Pollock on Contracts, 5th ed. p. 14, in considering the question of the formation of a contract under

the heading of "proposal and acceptance," the writer says: "We have to consider in particular cases whether some act or announcement of one of the parties is really the proposal of a contract, or only an invitation to other persons to make proposals for his consideration. This depends on the intention of the parties as collected from their language and the nature of the transaction, and the question is one either of pure fact or of construction."

Judgment.

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OSLER,  
J.A.

See also *Spencer v. Harding*, L. R. 5 C. P. 561; *Harty v. Gooderham*, 31 U. C. R. 18; *Reuss v. Picksley*, L. R. 1 Exch. at p. 353. The terms of this instrument upon their proper construction are, I respectfully think, the proposal of a contract, not the invitation of an offer, and therefore when signed by Frogley there was a complete agreement.

The case of *White v. Tomalin*, 19 O. R. 513, relied on by the defendants, is distinguishable. There, there was an offer to sell generally which could not be applied to any one who should sign at the foot of the offer signed by the vendor. Such a person could not point to the paper when so signed by him and say it appears from that paper that I have signed as purchaser. His signature was meaningless without parol evidence.

Here, when the purchaser signed the offer, it was instantly identified with the vendor's proposal to sell to any one who would sign that offer, and the purchaser was identified as the person to whom the proposal was made, so that there is on the face of the whole instrument the complete contract which was wanting on the face of the signed paper in the case referred to.

If, however, instead of treating the proposal as the proposal of a contract to any one of the public who might take it up, we regard it as the proposal of a contract to that particular person whose verbal offer had been communicated to Moynihan, though without disclosing his identity to the latter, and which verbal offer was embodied in the written terms over Moynihan's acceptance, there is still on the face of the instrument a valid contract without the necessity of introducing parol evidence to complete it. While parol evidence might have destroyed it (as I am

Judgment.  
OSLER,  
J.A.

now assuming), if it could have been shewn that Frogley was not the person whose offer had been communicated to Moynihan, the agreement is good on its face, parol evidence is not necessary to complete it, and the only effect of its introduction is to shew that the offer was accepted by the person with whom he intended to contract.

Deciding, therefore, that the contract in form is not open to objection, I am, nevertheless of opinion, that on the grounds taken by the learned trial Judge, the plaintiff is not entitled to specific performance. I think that Moynihan and his codefendant can set up the intoxication of the former as a defence.

The case of *Shaw v. Thackray*, 1 Sm. & G. 537, cited by Mr. Bain, is not in point, for there the vendor had actually conveyed the estate to his second vendee, who was held not to be entitled to set up as a defence to the first vendee's action the vendor's intoxication; and there were moreover other circumstances in the conduct of the second vendee in getting his contract and conveyance which influenced the Vice-Chancellor in so holding. Here the estate has not been conveyed, and Moynihan is a necessary party, active relief is sought against him, and the defendant Harrington's conduct is not open to unfavourable observation.

I confess I regard the whole transaction by Moynihan's agent in getting from him this agreement with Frogley, and afterwards procuring the plaintiff to take an assignment of it from the latter, as requiring a much fuller explanation than it received at the trial. I see no reason to interfere with the judgment.

MACLENNAN, J.A. :—

I think that on both grounds the appeal fails. There was not, in my opinion, any memorandum valid under the statute, but if there was, specific performance should be refused because of the intoxication of Moynihan at the time his alleged assent was obtained.

*Appeal dismissed with costs.*



## BARRY V. ANDERSON.

*Mortgage—Power of sale—Assigns—Short Forms Act, R. S. O. (1887), ch. 107.*

A mortgage made in alleged pursuance of the Short Forms Act contained the following provisions as to sale :—

“ Provided that the said mortgagees on default of payment for one month, may on ten days notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators, and assigns, may buy in and resell without being responsible for any loss or deficiency on resale ” :—

*Held*, [BURTON, J. A., dissenting], that the power of sale could be validly exercised by the assigns of the mortgagees.

*In re Gilchrist and Island*, 11 O. R. 537 ; and *Clark v. Harvey*, 16 O. R. 159, considered.

THIS was an appeal by the plaintiff from the judgment of GALT, C. J., on appeal from a Master's report. Statement.

The plaintiff, as trustee for one Murphy, was the assignee, after several mesne assignments, of a first mortgage on certain land and held also a second mortgage on the same land. The action was brought on the covenants in the first mortgage to recover a deficiency after a sale under power of sale, and a reference was directed.

The Master held that the first mortgage had been satisfied by the receipt of rents, the plaintiff contending that these rents should be applied on the second mortgage, and GALT, C. J., upheld the Master's finding.

The defendants also contended that the plaintiff had no right to sell under power of sale, the provisions of the mortgage (made in pursuance of the Act Respecting Short Forms of Mortgages) as to this being as follows :—

“ Provided that the said mortgagees on default of payment for *one month*, may on ten days' notice, enter on and lease or sell the said lands.

“ And provided also that in case default be made in payment of either principal or interest for two months after

Statement.

any payment of either falls due, the said power of sale and entry may be acted upon without any notice.

“ And also that any contract of sale made under the said power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators and assigns may buy in and resell without being responsible for any loss or deficiency on resale.”

The appeal came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, J.J.A.], on the 15th of January, 1891.

*W. Cassels*, Q. C., and *T. P. Coffee*, for the appellant.

*Moss*, Q. C., and *T. P. Galt*, for the respondents, the Chadwicks.

*A. H. Macdonald*, Q. C., and *W. Macdonald*, for the respondents, the Andersons.

March 26th, 1891. The appeal was allowed with costs, the Court holding that the plaintiff had properly applied the rents on the second mortgage. As to the contention as to the power of sale, which alone requires any notice, the following remarks were made:—

OSLER, J.A. :—

I remain of the opinion I expressed upon the argument that the power of sale was well exercised by the assignee of the mortgage, and that it was not personal to the mortgagees. The mortgage contains two if not three clauses which bear upon it. There is first the usual short form clause of power of sale after notice which must be read, in accordance with the Act and clause 3 of the Directions, R. S. O. (1887), ch. 107, Schedule B., Form 14, in the extended form, the substitution of the word “month” for “months,” if important, being in my humble judgment an express qualification within the meaning of the Act, of Form 14 in the first column of the schedule. Then follows a separate

clause: "Provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice." This clause is to be read just as if the previous clause had been set forth in its extended form, since that clause is, as I hold, in exact compliance with the Act, and is therefore to be construed as if it had been in the form of words in column 2 of the schedule, the extended form. Reading the second clause as following the extension it declares that in the event it provides for, the said power of sale and entry may be acted upon without notice. All the terms of that power therefore, except as varied by the terms of the 2nd clause, are brought into that clause by relation, and among those terms is the provision that it may be exercised by the heirs, executors, administrators or assigns of the mortgagee. The next clause aids this construction by providing that "any sale under the power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators and assigns may buy in and resell without being responsible for any loss or deficiency on resale." The case appears to me distinguishable from *Re Gilchrist and Island*, 11 O. R. 537, and *Clark v. Harvey*, 16 O. R. 159, where the mortgages did not contain the symbolical form given in column 1 of the schedule, and it therefore became impossible to revert to the exponential form in column 2. It is plain, for the reasons already given, that no such difficulty exists here.

Judgment.

OSLER,  
J.A.

As bearing on the question the cases of *Re British Canadian Loan and Investment Co. and Ray*, 16 O. R. 15, and *Canada Permanent Building Society v. Teeter*, 19 O. R. 156, may be referred to.

MACLENNAN, J. A. :—

It was contended that the sale was void, because the power could not be exercised by an assignee: *Re Gilchrist and Island*, 11 O. R. 537. The power here is the short form,

Judgment. prescribed by the statute, on default of payment for a month and ten days' notice, with this addition: "and provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice." When this is read with the preceding proviso in its extended form, I think it plainly enables the same persons to exercise the power in the one case as in the other.

MACLENNAN,  
J.A.

HAGARTY, C. J. O., concurred.

BURTON, J. A. :—

It was urged upon behalf of the Messrs. Chadwick that, as the sale took place without proper notice, the plaintiffs had not satisfied the onus that was upon them of showing that there was a deficiency, and if the case had stood there—the property having passed by the sale to a *bonâ fide* purchaser,—I should have thought there was much force in the objection, but they have not confined their defence to that. They say, these defendants also submit that the powers of sale contained in the said mortgage, were and are not such as can be exercised by an assignee of the mortgage. And they add in their reasons of appeal, the right to exercise the power of sale under the mortgage did not pass to the assignee, and there has been no valid exercise of such power; and the point was again pressed before us on the argument by counsel. In this I agree with them.

I think that the second proviso giving a power of sale without any notice, is clearly not within the Act relating to short form mortgages, and that it must be construed according to the ordinary rules of construction, and so construed the power is personal to the mortgagee.

I have felt more difficulty as to the first proviso. It was contended that it also was not within the Act, because it was manifestly within the contemplation of the framers



of the Act that there should be at least *two* months default, explained in the extended form to be calendar months, and that a person intending to avail himself of the Act should comply with its requirements.

Judgment.  
BURTON,  
J.A.

That objection strikes me as being more formidable than I at first supposed, and it tends to show, as was pointed out in *Emmett v. Quinn*, 7 A. R. 306, how important it is to adhere as closely as possible to the form given by the statute.

The question is, whether the substitution of "month" for "months" is authorized by section 3 of schedule B, which provides that "the parties may introduce into or annex to any of the forms in the first column, any express exceptions from or other express qualifications thereof respectively; and the like exceptions or qualifications, shall be held to be made from or in the corresponding forms in the second column." Is the substitution of "month" for "months" an exception or qualification within the meaning of this section? If so, it would seem that the substitution of day or week for months, would be equally warranted, and that such a change would be an exception or qualification within the meaning of section 3.

After giving the matter my best consideration, I have come to the conclusion that, as the parties have limited the default to one month instead of two or more months, as would seem to be necessary if they desire to avail themselves of the short form Act, the proviso has no operation under the Act, and must derive its efficacy wholly from the contract, which must be construed according to the ordinary rules, and so construed, is personal to the mortgagee, and does not extend to his assignee. But then the only effect of this is, that the sale was void, and that the Messrs. Chadwick, though still liable upon their covenant, are upon payment entitled to redeem.

I agree, therefore, in allowing the appeal.

*Appeal allowed with costs.*

THE CORPORATION OF THE TOWNSHIP OF SOMBRA ET AL.  
V. THE CORPORATION OF THE TOWNSHIP OF CHATHAM.

*Municipal corporations—Drainage—R. S. O. (1887), ch. 184, sec. 569,  
et seq.*

The burden of extra or unforeseen expense in connection with drainage works, constructed under the Municipal Act, sec. 569, *et seq.*, such as, e. g., damages recovered because of negligent construction, must be borne by the ratepayers originally assessed for the cost of the works, and not by the general funds of the municipality.

Statement.

THIS was an appeal by the defendants from the judgment of ROBERTSON, J.

The litigant townships lie adjacent to each other, and the action was brought by Sombra for a mandamus to compel the defendants to properly complete and keep in repair a drain, known as the Whitebread drain, running along the dividing line between the two townships, the construction of which had been undertaken by the plaintiffs under a by-law duly passed for the purpose. One Murphy was also a plaintiff and claimed damages for injuries to his lands by waters penned back upon them, in consequence, as he alleged, of the negligent construction of the drain in question.

The action was tried at Sarnia before ROBERTSON, J., who found that the drain had been negligently and unskilfully constructed and not in accordance with the plans and specifications; and that Murphy had personally suffered damages, which the learned Judge assessed at \$150. He directed the drain to be properly completed by the defendants, charging the expenses and the damages and costs upon them, but directing that they were not to levy these expenses, damages, and costs, or any part of them, upon the lands originally assessed for the construction of the drain, because, as he held, the amount of the original assessment would have been sufficient to complete the work if it had been done properly.

The defendants appealed, and the appeal came on to be <sup>Statement.</sup> heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.], on the 31st of May, 1889, and by the direction of the Court was reargued on the 19th of September, 1890.

*Pegley*, Q. C., for the appellants.

*W. R. Meredith*, Q. C., and *Kittermaster*, for the respondents.

March 10th, 1891. HAGARTY, C. J. O. :—

As to the verdict of \$150 in favour of the plaintiff Murphy, I agree that he cannot recover except on proof of negligence in the performance of the work by the defendants.

At the close of the elaborate argument of the case I had a strong opinion that there was ample evidence of negligence, as found by the learned Judge, to warrant a recovery on Murphy's part.

[The learned Chief Justice discussed the evidence and continued :]

I think there was ample evidence of negligence in the execution of this public work sufficient to support the judgment in favour of Murphy.

In the execution of an authorized public work a large amount of inconvenience and possible loss may result to individuals, without any remedy. If, as a necessary result, a legal injury is caused, the only remedy would be the statutable compensation on reference.

But for clear, palpable, negligence on behalf of those entrusted with its performance, for an absurd and unnecessary process of construction certain to cause injury, and extending the inevitable inconvenience to property owners which need not extend over a year to a period of four or five years, and allowing the whole work to fall into a state of inefficiency, I cannot but think that a cause of action is given to the injured party.

Judgment.

HAGARTY,  
C.J.O.

No objection is taken in the defence to Murphy's proceeding by action instead of seeking compensation under the statute, nor is it taken in the reasons of appeal.

I am unable to agree with the trial Judge in his direction as to the levying of moneys required for completion or due execution of the works. I do not understand how the burden of extra or further expense should be borne by the defendant corporation and not by the ratepayers originally assessed for the cost.

I think under the statute the area of improvement must bear the extra burden.

The Legislature allow the majority in the area to bind the minority for the cost of the projected improvement.

All the assessed ratepayers thus embark in (as it were) a joint adventure from which certain results are anticipated.

A surveyor is authorized to devise a scheme of improvement. The municipality adopt it, and machinery is provided for adjusting and finally settling the distribution of the burden of assessment. If the scheme devised and adopted ultimately fail in producing the expected results of benefit, no responsibility can thereby attach to the corporation faithfully executing the unsuccessful work. If the sum provided in the estimate prove insufficient to complete the work I think the funds required must come from the assessed properties.

Section 573 provides that if the by-law does not provide sufficient means for the completion of the work the council may amend it from time to time to carry out the intention, etc.

The report here directs the drain when completed to be kept in repair by Chatham at the joint expense of Chatham and Sombra, and of the lands assessed; the municipalities and the lands paying in the relative proportion for construction.

Section 583 directs the municipalities to repair in the proportion directed by the engineer, and (sub-sec. 2) directs that on neglect to repair, on notice in writing they may



be compellable by mandamus to do such repairs, and (sub- Judgment.  
sec. 3) that the deepening, extending and widening of a  
drain to enable it to carry off the water it was originally  
designed to carry off, shall be deemed a work of preser-  
vation and maintenance. Where the expense may exceed  
\$200, proceedings shall be taken under sec. 585. See the  
amendment to this section by 52 Vict. ch. 36, sec. 35, (O.)

HAGARTY,  
C.J.O.

Then comes section 585. If it be deemed expedient to  
change the course or make a new outlet or otherwise  
improve, extend, or alter the drain, the municipality whose  
duty it is to preserve, etc., on the report of an engineer,  
may complete such alterations, etc., under the provisions of  
sections 569 to 582, without the petition required by  
section 569.

Section 589: Where the repairs required to be made un-  
der either sections 583 or 586, are so extensive that the  
county do not deem it expedient to levy the cost in one  
year, it may borrow on debentures the funds necessary for  
the work, and assess and levy on the property benefited  
a special rate sufficient to pay principal and interest, and  
the by-law shall not require the assent of the electors.

Section 592: Whenever damages are recovered against  
the corporation or parties executing drainage works, or  
other relief is given by any judgment or order of any Court,  
or award made under this Act, all such damages or any sum  
of money that may be required to enable the corporation  
to comply with any such judgment, order, or award, shall  
be charged *pro ratâ* upon the lands and roads liable to  
assessment for such drainage works, with a provision that  
if to enable the corporation to comply with any such judg-  
ment, order, or award, it be necessary to change the course,  
make new outlet, or otherwise improve or alter, etc., the  
works shall be dealt with, carried out and works exe-  
cuted, as if they were works or alterations under section  
585.

All these sections clearly point to the conclusion that  
the burden of doing all necessary works to complete this  
Whitebread drain, or to improve, alter, or extend the same

Judgment.

HAGARTY,  
C.J.O.

must be borne by the land benefited; in other words, the area of assessment has to pay for all necessary extra cost or necessary alterations.

The learned trial Judge held that the sum originally provided was sufficient to complete the drain, if the construction had been properly managed by the defendant corporation. But I do not think such a finding can shift the burden of completion, or alteration, to ensure efficiency, from the area of assessment to the general funds of the township of Chatham.

For better or for worse, the original coadventurers, as I have called the assessed ratepayers, must be the parties liable for this scheme of projected improvement.

The work has so far not answered expectations. I see no remedy or means of shifting the burden.

I feel great difficulty in agreeing that mandamus can be properly ordered on the ground of non-repair after written notice under section 583. The only notices given bear date November 9th, 1887, calling for repairs to be done by the 23rd of the same month, and the writ was issued on 28th November.

I cannot regard such a notice as reasonably sufficient. The council may or may not have been in session, and a fortnight was hardly a reasonable time within which to provide funds or prepare for so large a work.

It is still in the power of the plaintiffs to give such notice, and then the large powers of the amending Act of 1889 can be exercised by reference to the County Judge, who could dispose of such notice, with an appeal from his decision to a Divisional Court, as to the sufficiency of the notice, and as to whether mandamus should or should not issue. Large powers are there given as to ordering whether the work should be done wholly or in part, and under sub-section 3 of section 583, the deepening, extending, or widening the drain to enable it to carry off the water shall be deemed to be a work of maintenance and keeping in repair.

In view of this legislation, and under all the circum-

stances of the case, I think that in our discretion we ought not in this suit to make any order or decree under section 592, or such as is directed in the Court below. When a proper notice is given the matter can, we think, be more fully and adequately dealt with.

Judgment.  
HAGARTY,  
C.J.O.

BURTON, J.A.:—

I think the judgment is clearly unwarranted in law in directing that the damages and costs shall be levied upon the ratepayers other than those who were assessed for the original construction of the drain; on the contrary, I am of opinion that the same, if recoverable at all, are chargeable *pro rata* upon the lands and roads liable for assessment for the original work.

As to whether Murphy should upon the evidence have recovered at all, I have felt much more difficulty. I have little hesitation in saying that if I had tried the cause I should have held that the evidence is overwhelming to shew that the damage which he suffered was not attributable to any negligence in the construction of the works—the negligence was not the *causa causans*—but that his remedy, if any, was for compensation; but I cannot say that there was not some evidence which must have been submitted to a jury, and that if they had chosen to give effect to it, the Court, looking to the smallness of the amount involved, would not have interfered.

I do not doubt that the drain has not been completed in exact compliance with the specifications, but it has been certified as completed, and accepted by the council, who, I assume, in their discretion had a right to waive an exact compliance with the specifications.

But there is some evidence of waiver even on the part of Sombra who contributed a sum for the improvement of the work by dredging after it was so accepted as complete; and I think it clearly not a case in which the extraordinary powers of the Court of interfering by mandamus should be exercised, more especially as by recent amend-

Judgment.

BURTON,  
J.A.

ments in the law full relief can be obtained by giving notice to make the alterations or repairs required, if in point of fact they are necessary; and the manifest intention of the Act is to leave the management of these works as much as possible in the hands of the ratepayers and the local authorities. I am of opinion, therefore, that that portion of the judgment should be reversed, and the relief asked for by Sombra refused, and the action dismissed; and that the relief of Murphy should be enforced by a rate chargeable upon the lands and roads originally assessed.

As to that portion of the complaint which refers to the repairs, the notice to repair given so very shortly before the commencement of the suit, was clearly insufficient.

The appeals as regards Sombra, should be allowed, and dismissed as to Murphy, but varied as to the mode of enforcement. The townships may well be left to bear their own costs of appeal.

OSLER, J. A. :—

[The learned Judge stated the facts and continued:]

There is, I think, abundant evidence in support of the learned Judge's finding that the drain never was completed in accordance with the engineer's plan, report and specifications. In one part of it, near the eastern end, it had not been excavated to the depth required, by as much as three feet, and this for a distance of forty-seven feet. At the west end, there was said to be at one place a deficiency in depth of two feet. At other places in its course there were irregularities in the depth more or less serious, and the contractors had in some instances during the execution of the work left dams in the course for the purpose of keeping water out of the cuttings, which they omitted to remove. These were defects and omissions in the construction of the drain, not to be confounded with irregularities in the bottom and filling at the outlets attributable to silting up at the mouth or washing down of the soil



from the banks during the long period the work was under construction.

Judgment.

OSLER,  
J. A.

The learned Judge expressly finds that it was in consequence of this unfinished and incomplete condition of the drain, that it proved of insufficient capacity to carry off the waters brought into it by the three Sombra drains; and that these waters were thereby caused to back up upon and flow over the plaintiff's property. In that state of things, and upon these findings, the plaintiff is clearly entitled to recover damages against the defendants in an action. They have obstructed the outlets of the drains which formerly carried water away from his land, and have so negligently constructed the Whitebread drain, in the execution of the work, and in not completing it on the original design and to the stipulated depth, as to fail in providing another outlet for the waters thus obstructed by them.

As regards the case of the plaintiff Murphy, assuming that there was power to construct this drain on the town or county line, so as to impose a liability on Sombra, and that the defendants acting upon the report of their engineer, had, without negligence, constructed and completed a drain, which by reason of some inherent defect in the scheme proposed by the petitioners, had failed in its object, the plaintiff's sole remedy would have been by arbitration under the Act. But the works authorized having been negligently and improperly executed, and thereby having caused damage to the plaintiff, his right of action is complete, and the case fully within the class of cases of which *Geddis v. The Proprietors of the Bann Reservoir*, 3 App. Cas. 430, is an illustration, and the plaintiff is entitled to judgment for the damages assessed. The defendants invite us to enter upon a critical examination of the scheme adopted by them, and upon a comparison of the levels of the proposed drain and the outlets with the height of the plaintiff's land, to decide that the injury he complained of would probably have happened, even if the work had been completed, and there

Judgment.

OSLER,  
J. A.

had been no neglect on their part. Such a line of defence is not, in my opinion, open to them; they have negligently failed to do what the by-law authorized them to do, and the result of their negligent interference is, that the condition of things has been altered to the plaintiff's damage.

On this part of the case a point was attempted to be made upon the omission to give any reasonable notice to repair; but, as in my opinion the plaintiff's injury was caused by negligence in the original construction, the case is not within section 583, sub-sections 2 and 3, and notice was unnecessary. That section, assuming it to "apply as far as applicable" to the work now in question, by force of section 597, enacts that *after such work is fully made and completed*, it shall be the duty of each municipality within its own limits to preserve, maintain, and keep it in repair, etc.

This provision, however, must of course in the case of a drain of this peculiar character, which cannot be said to be within any municipality, be controlled by section 577, so that while the work of repair is done by one municipality the cost of it falls upon the drainage area mentioned in the by-law in accordance with the engineer's report. Then sub-sec. 2 of sec. 583 enacts that any municipality neglecting or refusing to keep the work in repair upon reasonable notice in writing being given by any person interested and who also is injuriously affected by such neglect, that is to say a neglect or refusal after notice, "may be compellable" by mandamus to make the necessary repairs and shall also be "liable to pecuniary damage to any person who or whose property is injuriously affected by such neglect or refusal;" *Crysler v. Township of Sarnia*, 15 O. R. 180; *White v. Township of Gosfield*, 10 A. R. 555.

It may hereafter have to be considered how far the last case can under the present Act be treated as an authority for the application of sub-sec. 2 of sec. 583, and the amendments added thereto by 52 Vict. ch. 36, sec. 35, to the class of drains mentioned in sec. 586, those namely which are wholly within and benefit only lands within one municipality.

As to the case of Sombra :—The judgment as drawn up and entered is not a judgment for a mandamus under this sec. 583 (2) to make the repairs necessary to preserve and maintain the drain, but a judgment directing the defendants to complete it to the width and depth, and in the manner, required by the plans and specifications, etc., upon which it was undertaken, and with proper and sufficient outlets to carry off all the water which enters the same from time to time.

Judgment.

OSLER,  
J.A.

I am of opinion (though the point was not argued) that the plaintiffs are not precluded from contending that the drain was not completed as required, by the fact that the defendants' engineer accepted it from the contractors as completed, and reported it as such to the council.

Though he was appointed commissioner by the by-law to superintend the construction, that was a mere matter of convenience. The council was not bound to appoint him. His legal position was simply that of a servant or agent of the corporation, and they cannot, as I respectfully think, be heard to say that an uncompleted drain is the same thing as a drain which has become out of repair, which they can only be compelled to repair after notice.

The drain then never having been in fact completed, the case does not come as one of non-repair within sub-sec. 3 of sec. 583, which is confined to the deepening, extending, and widening of a work which has once been "fully made and completed"—in the language of that section.

It has not been suggested that the defendants are absolved from responsibility on the ground that the work was done by independent contractors. The terms of the contracts were not proved, and the control and supervision exercised by the defendants through the commissioner were evidently of such a character as to make it improbable that such a defence could have been successfully raised. See *Grassick v. City of Toronto*, 39 U. C. R. 306; *Gilchrist v. Township of Carden*, 26 C. P. 1 at p. 8; *Stephen v. Thurso Police Commissioners*, 3 Ct. of Sess. Cas., 4th Ser. 545; *Jones v. Corporation of Liverpool*, 14

Judgment.

OSLER,  
J.A.

Q. B. D. 890 ; *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488.

The right to the relief thus adjudged does not, as I have said, depend upon a notice to repair having been given, nor indeed upon any express enactment, but upon the interest which the plaintiffs have in enforcing the performance of the duty undertaken by the defendants to construct the drain in accordance with their by-law. To the extent I have mentioned, I think the judgment is right. But it goes on to declare, in accordance with a further special finding "that the amount provided by the by-law for the construction of the drain and which came to the hands of the defendants was sufficient to complete the drain in accordance with said plans and specifications, and would have so completed the same but for the want of skill, negligence, and unnecessary delay of the defendants in proceeding with and carrying on the work, and doth therefore order and adjudge that the costs of the works necessary to the completing of the drain as directed, be defrayed by defendants, and that they shall not be at liberty to assess or levy the same as a special rate against the lands and roads by the by-law assessed for the cost of the construction of the said drain."

The limitation imposed by this clause of the judgment is of a most unusual character. I can understand a general judgment against the defendant corporation, the means to comply with which must be obtained from the whole body of ratepayers in the manner provided by law ; or a judgment against the individual members of the council to replace a fund which they have wasted or misapplied, upon a proper case being made for charging them personally with the loss ; but I fail to see any authority for imposing the whole loss or liability exclusively upon that part of the township which has no interest at all in the drainage works out of which the trouble has arisen. Had there been no legislation upon the subject it might have been necessary to hold that there was a general corporate liability to be borne in the result by all the corporators, those who were not inter-



Judgment.

OSLER,  
J.A.

ested in the work as well as those who were. This judgment casts the whole of the loss upon that part of the township which is outside the drainage area, and exempts the latter from sharing in it though quite as much a part of the corporation as the former. It is in this respect unwarranted in principle and opposed both to the general policy and the express provisions of the drainage clauses of the Act, the evident intention of which is that the area benefited as defined by the by-law shall bear all the expenses incident to the work to the exclusion of the rest of the municipality of which it is a part: *Dillon v. Township of Raleigh*, 13 A. R. 53, at p. 62.

Section 592, which in its present form was introduced by 49 Vict. ch. 37, sec. 31 (1886), enacts that where on account of proceedings taken under the Act (1) damages are recovered against the corporation or other parties constructing the drainage works; or (2) other relief is given by any judgment or order of any Court, etc., all such damages, or any sum of money required to enable the corporation to comply with any such judgment, shall be charged *pro ratâ* upon the lands and roads liable to assessment for such drainage works; provided, always, that if to enable the corporation to comply with any such judgment it shall be necessary or expedient to change the course of the drain, to make a new outlet, or otherwise *improve or alter* any drain or drainage works, the same shall for all purposes be dealt with and carried out, and all works, etc., executed as if the same were alterations and improvements within the meaning of section 585, a section which enables the council to carry out works of improvement, extension, or alteration, for the purpose of better maintenance of the drain or to prevent damage to adjacent lands under the provisions of sections 569 to 582, without the preliminary petition required by section 569.

If the plaintiffs are entitled to a judgment ordering the defendants to perform the duty undertaken by them, as I think they are, then it appears to me to follow that the case comes fairly within section 592, and that all moneys

Judgment.

OSLER,  
J.A.

required to enable the corporation to comply with the judgment as regards payment of the damages, and the completion of the work, which necessarily involves its improvement and obstruction, must be raised under the provisions of that section and section 585.

I have already pointed out, that section 583 is not, in my opinion, applicable to cases of an uncompleted drain. It may be said that sub-section 16 of section 569 is the only one which makes any provision for the completion of works which have been partly or insufficiently executed; and that under that sub-section proceedings are to be instituted by petition, and are in other respects of the same voluntary character as those under which the incomplete work was begun and carried on.

This provision, however, which accords with the general policy of the Act, that the funds for the work are to be obtained from the drainage area, is not, as the law now stands, (section 592 being a much later provision) inconsistent with the existence of a right in the parties interested to compel the corporation charged with the duty of executing the work to perform it. That section evidently contemplates that a judgment may be recovered against the corporation, other than a judgment for damages or a mere money demand; and provides that whether for damages or other relief, the funds necessary to enable them to comply with it, are to be raised from and charged *pro ratâ* upon the drainage area.

I think the judgment should be varied by striking out the third paragraph, and that to this extent, the appeal should be allowed.

MACLENNAN, J.A. :—

[The learned Judge stated the facts and continued : ]

The first question I shall consider is the plaintiff Murphy's right to recover the damages awarded to him by the judgment. His case is that he has suffered damage from two causes, namely, non-completion, and non-repair.

I think it is clear that mere non-completion according to the plans and specifications is in itself not actionable; there must be negligence; the omission must be in something essential and must have been attended with damage. The plaintiff, therefore, to enable him to recover for non-completion, must shew two things, namely, the non-completion of something essential, which the defendants were bound to complete, and that the omission had caused damage. Has the plaintiff made these two points out? There can be no doubt that during the spring freshets his land is overflowed, but the question is as to the cause of the flood. If it is due merely to excessive spring floods coming down the different drains and filling the Whitebread drain and overflowing the land temporarily until it has time to escape by the Whitebread drain, that is clearly not actionable. There is no negligence. The Legislature authorized the works which have produced this result, and the remedy of the party complaining is by arbitration and not by action. On the other hand, if the drain was negligently constructed in any particular, and if that is the cause of the damage he may bring his action.

Judgment.  
MACLENNAN  
J.A.

[The learned Judge then discussed the evidence very fully and came to the conclusion that the drainage works in question did not cause the injury complained of. He then continued : ]

Now while it was contended that the drain in question was a mistake in its plan, and was not and could not be a success, and that it would have been better, for Sombra at all events, if the old Pacific and the old Buckingham outlets had been adopted instead of the new outlets, it was not contended that the by-law was illegal, or one which the defendants had no legal authority to pass, or that the work was not one that the council had power to do. That being so it follows from the decisions in this Court in *Preston v. Corporation of Camden*, 14 A. R. 85, and *Pratt v. City of Stratford*, 16 A. R. 5, that the plaintiff's remedy for the damages proved in this case is by arbitration alone, and

Judgment. not by action, and that, in my humble judgment, is the proper conclusion.

MACLENNAN,  
J.A.

The statute, sec. 583, provides (1) that after a drain is fully made and completed it shall be kept in repair at the expense of the municipality, or of the parties more immediately interested, as to the council may seem just on the report of the engineer; and (2) that in case of neglect or refusal upon reasonable notice in writing being given by any person interested, and who is injuriously affected by such neglect or refusal, the municipality is compellable to repair by mandamus, and is liable in damages for injury arising from such refusal or neglect; and (3) that the deepening or widening of a drain to enable it to carry off the water it was designed to carry off, shall be deemed a work of preservation, maintenance, or keeping in repair, within the section.

It was contended before us that because this drain was shewn never to have been excavated to the full depth required and prescribed by the by-law, this section was inapplicable, as it could not be said to be a work fully made and completed.

I am, however, of opinion that where as in this case the work was made and completed in the judgment and estimation of the parties who undertook it and did it, and where the commissioner certified that it was complete, and the council accepted that certificate without objection, and paid in full for the work, it would defeat the object and purpose of the enactment to hold that the duty of maintenance and repair imposed by the section did not attach because some part of the work was either deliberately or accidentally omitted, or left incomplete, and so I think that section 583 is applicable.

It was contended by the defendants that the plaintiffs must fail altogether in their action for want of the notice required by this section, both as regards the claim for damages, and the claim for a mandamus.

The learned Judge thought there was sufficient notice, and whether it was sufficient or not, that the defendants



could not raise the objection, not having set it up in their statement of defence. I am unable with great respect to agree with the learned Judge on the point of pleading. It is neglect and refusal to maintain and repair, upon reasonable notice in writing, that gives the right both to the mandamus and the damages. Without the neglect and refusal there is no right of action, and I think it lay on the plaintiffs both to allege, as they did, and to prove, the reasonable notice in writing, and the subsequent neglect and refusal. I am of opinion that there was no sufficient notice in writing in this case. The first notice was on the 21st of September, 1886. It is clearly not a notice to repair. It is a complaint of non-completion and claim for compensation. The other notices were served on the 10th of November, 1887, one by the plaintiff Murphy and the other by the plaintiff the Township, in similar terms. They complain of nonrepair and require repair to be done by the 23rd of the same month, otherwise an action will be commenced. The action was commenced on the 28th of November. I think these notices were all insufficient and unreasonable and do not entitle the plaintiffs to maintain this action. The complaint made in the notice is want of repair for a long time past, not specifying wherein the want of repair consists. The want of repair complained of in the action is insufficient depth both originally and by reason of filling up with sediment, and the notice requires this to be remedied in thirteen days, by a municipal corporation. It is too plain for argument that these notices are not reasonable, and cannot assist the plaintiffs.

Judgment.

MACLENNAN  
J.A.

The learned Judge appears to have been of opinion that where a municipality in the situation of the defendants makes a drain and claims and receives a contribution from another municipality towards its construction, it is compellable by law, apart from any special provision of the statute, to do the work in all respects in accordance with the plans and specifications of the by-law ; that the contributing municipality is entitled to have the very thing for which they have been assessed, and for which they

Judgment.  
MACLENNAN  
J.A.

have paid; and there is apparent reason and justice in that proposition. Upon that view, he has ordered the defendants, at their own expense, and within a limited time, to complete the drain, and according to the by-law and the plans and specifications, and to make proper and sufficient outlets at both ends to carry off the water, and as it should be, as shewn on a certain plan; and he has ordered this to be done at the sole expense and charges of the defendant municipality.

It must not be forgotten, however, that local drainage by-laws are not ordinary contracts, and that they are not even like ordinary by-laws, which affect merely the inhabitants of a municipality in their corporate capacity, and the same inhabitants individually. While it is the corporation that is acting, it may be that only a very small number of the corporators are concerned or interested in the particular action. The action is done at the instance and request and for the benefit of a few, and it would seem to be only reasonable that it should be at the sole risk of those few, that those who are to be benefited in case of success, should alone bear the loss in case of failure. *Qui sentit commodum sentire debet et onus*. I think, therefore, that in all such cases the corporation must be considered to be acting in a special statutory capacity, as representing those persons only who are interested in the particular work; and that whatever loss or damage arises from any cause whatever in connection with the particular work, should be borne by those interested and those only. Why should ratepayers, in a distant part of the township, have to contribute to make good the damages caused by accident, or by the mistake of an engineer, or by the default of a contractor, or even by the blunder of the council, in a matter which they were managing at the request and for the benefit of a few others?

I think these considerations are applicable to the present case. The council carried out this work through a commissioner appointed for the purpose, a professional man of character, ability, and experience. It was paid for as a

completed work, approved, accepted, and certified by their engineer. There is no suggestion of wilful misconduct by any one. After the original sum provided by both councils was expended, a further sum was contributed by both for the improvement of the work by dredging. The case is simply that of a work done at the request and on behalf of parties interested at their common expense, which has not answered expectation. The failure is the misfortune of all concerned. It may have been the fault of the engineer if he did not see that the contractors did their work, or he may have been imposed upon, but that is no reason why the general ratepayers, the majority of whom are not concerned in the matter at all, should have a heavy burden cast upon them.

Judgment.

MACLENNAN,  
J.A.

I think this is not a case in which the Court is called upon, on any just principle, to require the defendants by mandamus to dig this ditch to the full depth, in order that the exact terms of the law may be fulfilled. The interference of the Court is discretionary, and I think it is not a case in which it should interfere.

But if this were such a case, I think, with great respect, that the learned Judge was wrong in requiring the work to be done at the expense of the defendants out of their general municipal funds. It is not the case of their having improperly misapplied the funds provided for this work to other purposes, or a case of wilful misconduct or wrong doing, and I see no reason why section 592 of the Act should not govern, which directs that all damages or any sum of money which may be required to enable a corporation to comply with any judgment, order, or award, in respect of drainage works, and local assessments therefor, shall be charged *pro ratâ* upon the lands and roads liable to assessment for such drainage works.

My judgment upon the whole matter with great respect therefore is as follows:

1. The plaintiff Murphy has not established any claim for damages arising from the negligence of the defendants.
2. The damages he has proved are shewn to be occa-

Judgment. sioned by the essential character of the work itself, for  
MACLENNAN which his only remedy is by arbitration.

J.A.

3. No sufficient notice was served upon the defendants to entitle the plaintiffs to maintain this action, either for a mandamus to deepen or repair the drain, or for damages for neglect or refusal to deepen or repair the same.

4. This is not a case for mandamus to enforce exact and literal compliance with the by-law on grounds independent of section 583 of the Act.

5. There is no ground for requiring the defendants to pay damages or to complete or repair at the general expense of the municipality.

And finally the only remedy of the plaintiffs, apart from damages arising from the essential character of the work, is under section 583 as amended by 52 Vic. ch. 36, sec. 35. Under that section as amended, if the plaintiffs still think that the drain requires deepening, or widening, or repairing, they can serve the prescribed reasonable notice in writing, and if there is any question whether the work ought to be done, that can now be determined by the County Judge, subject to appeal.

In my judgment the present appeal ought to be allowed.

*Appeal allowed in part, and, MACLENNAN, J.A.,  
dissenting, dismissed in part.*

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## MCNAMARA V. KIRKLAND.

*Mechanics' lien—Proceeding to realize—Counter-claim—R. S. O. (1887) ch. 126, sec. 23.*

A defence filed by a lien-holder within the period mentioned in sec. 23 of R. S. O. (1887) ch. 126, in an action by the owner of the property to set aside the lien is not a "proceeding to realize the claim" within the meaning of that section, though a counter-claim, if properly framed and a certificate thereof duly registered might be.

*Per OSLER, J. A.*—Observations as to the effect of registration of the lien. *McVean v. Tiffin*, 13 A. R. 1, considered.

*Per MACLENNAN, J. A.*—The defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings.

THIS was an appeal by the plaintiff from the judgment <sup>Statement.</sup> of STREET, J., at the trial.

The action was brought for the purpose of having vacated a mechanics' lien registered at the instance of the defendant against the plaintiff's property.

One Jordan had contracted with one Maloney to build a row of shops on the property in question, of which Maloney was then the owner, and the defendant had sub-contracted with Jordan to supply the brick necessary for the buildings. The last delivery of the brick under the defendant's contract was on the 20th of September, 1889, and Maloney sold and conveyed the property to the plaintiff on the 25th of September, five days later.

The defendant's lien was registered on the 19th of October, and on the 29th of October the plaintiff commenced this action. His right to relief as set forth in the statement of claim was rested on two grounds, viz: (1) That at the time of his purchase and the registration of his deed he had no notice or knowledge of any mechanics' lien or claim of the defendant against the lot or against the interest of Maloney or any other person therein; and (2) that the lien was not registered in respect of any liability of the plaintiff or in respect of material furnished

**Statement.** to him and was illegal and void as against Maloney and the plaintiff, the present owner of the lot.

In the statement of defence the defendant alleged that though the plaintiff's deed was registered prior to the registration of the defendant's mechanics' lien, yet the plaintiff had actual notice that the defendant had a claim under the Mechanics' Lien Act for materials supplied for, and used in, the buildings on the lot, before the plaintiff took the deed and paid the consideration; (2) that the deed was made by Maloney and taken by the plaintiff in pursuance of a fraudulent scheme between them to defeat the claims of the lien holders, including the plaintiff; (3) that even if the deed was not found to be fraudulent and void as against defendant, as having been taken with notice of the defendant's claim, yet that he was, notwithstanding the delivery and prior registration of the deed, entitled to have his claim satisfied out of the property under and by virtue of the provisions of the Mechanics' Lien Act, and "the defendant as a defence to this action pleads the said Act." He then claimed that the deed should be declared fraudulent and void as against him, and that in any event it should be declared that he was entitled as a purchaser *pro tanto* under the Act to priority over the plaintiff.

This defence was delivered on the 20th of November, 1889, and on the 28th of November the defendant commenced an action in the High Court for the purpose of enforcing the lien. A certificate of *lis pendens* in respect of that action was duly registered in the proper registry office on the same day, but no further proceedings were taken until after the judgment in this action, when the name of McNamara was struck out.

The present action was tried before STREET, J., and by the judgment at the trial it was declared that the plaintiff, before the conveyance of the property was delivered to him, and before he paid any part of his purchase money, had actual notice that the defendant, as a sub-contractor, was entitled to a lien under the Act for the price of the brick in question, and that the defendant had a lien on the property, and the action was dismissed.

The plaintiff appealed, and the appeal came on to be Statement. heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 17th of September, 1890.

*S. R. Clarke*, for the appellant.

*Watson*, Q. C., and *H. C. Fowler*, for the respondent.

The main contention of the appellant was that the lien, even if good as against him originally, had been lost because no proceedings to enforce it had been taken, while the respondent argued that the successful defence of the present action was sufficient to preserve his rights, and that the judgment should be amended by the insertion of the usual provisions for the realization of the lien.

March 10th, 1891. BURTON, J. A. :—

I quite agree with the other members of the Court, that no ground has been shewn for interfering with the judgment of the Court below so far as it dismissed the plaintiff's action for the cancellation of the lien; and I was inclined on the argument to think that the judgment, so far as it affirmed the lien of the defendant, might be supported, and had not gone far enough in not directing a sale.

There can be no question as to the general rule that the mere dismissal of a plaintiff's bill does not affect the right of a defendant to proceed upon his counter-claim when a counter-claim has been properly made. But two answers suggest themselves here: 1st, that there is here no counter-claim in the strict sense of the term; and, 2ndly, that the action to enforce a mechanics' lien is a creature of the statute, and unless the conditions of the statute are complied with, the action is not maintainable.

Here the defendant did within the ninety days prescribed by the statute, and after the parties were at issue in this suit, institute proceedings and file a certificate of *lis pendens*, but if he had omitted to file the certificate of

Judgment. *lis pendens*, and had even served the writ, would not the omission to file the certificate be fatal in that suit?

BURTON,  
J.A.

My present impression is, that it would, and that a plea to the effect that the lien had ceased to exist by reason of the certificate of *lis pendens* not having been registered, would have been a complete answer; and if he omitted without sufficient reason to serve the writ within the time prescribed by the practice of the Court, it seems to me as at present advised, that his remedy would be wholly gone.

In the present suit the plaintiff recognizes as a fact the registration of the lien, but having notice of it, he seeks to vacate it on various grounds on which he fails, and the judgment affirms the validity of the registration.

Having succeeded in getting this affirmance of his lien, the defendant very improvidently, as I cannot help thinking, abandoned the proceedings against the appellant in the other suit by moving to strike his name out of the summons, under the impression, I presume, that having obtained all the relief he required in this suit, the other proceeding became unnecessary.

Now I am not at all prepared to say that if the defendant had made claim to realize his lien under the provisions of the Act in the shape of a counter-claim and had registered a certificate of *lis pendens* upon that counter-claim that he could not have done so. At present it seems to me that that would have been a sufficient compliance with section 23, but that was not done, and I am not prepared to hold that the judgment in his favour can be enforced in this case unless we go the length of holding that where the party whose lands are affected initiates proceedings to vacate the lien the lien-holder, if he succeeds, can work out his remedy in that suit and enforce the realization of his lien without regard to section 23. The mere circumstance that he registered his certificate of *lis pendens* in his own suit cannot I think help him. He has abandoned that suit—unless indeed the Court below can relieve him from the effect of his own motion—but he stands here without a counter-claim and even if the defence could by a very



liberal construction be converted into a counter-claim, without the registration of a certificate of *lis pendens* as the law provides.

Judgment.

BURTON,  
J.A.

Let us see what difficulties might arise if such a judgment could stand. The plaintiff when instituting proceedings registers a certificate of *lis pendens*, which puts an intending purchaser upon enquiry, who searches in the proper office and finds that that suit has been discontinued, and he proceeds with his purchase. Yet, at that very moment a judgment is being rendered in an action instituted by the owner of the land against the lien-holder to vacate the lien, and in which he has been unsuccessful. I say that in that suit a judgment is being entered in favour of the lien-holder to enforce his lien against the land which has passed into the hands of an innocent purchaser who had no means of ascertaining that such a lien existed.

Much, therefore, as I would desire to assist the defendant, I do not see my way to do so, but think that the appeal should be dismissed and the decision below varied by confining it to a simple dismissal of the plaintiff's action.

OSLER, J. A. :—

So far as this judgment declares that the plaintiff had actual notice of the defendant's lien before taking the conveyance or payment of the purchase money, and dismisses the action, it is, in my opinion, unassailable. I think the evidence fully supports the learned Judge's conclusion that the defendant was a lien-holder at the time of the commencement of the action; and that the bricks delivered on the 20th of September, were delivered under the same contract with Jordan as that under which the earlier deliveries had been made, so that the last delivery was not an isolated transaction, but carried the lien for the whole down to its date, and entitled the defendant to register his claim within thirty days after that time, as he did. That the plaintiff had notice of the lien, is proved beyond any reasonable doubt, and such notice is, I think, sufficient

Judgment.

OSLER,  
J.A.

to defeat, to the extent of the lien, the prior registration of his deed.

The Mechanics' Lien Act is, in many respects, most obscurely phrased and difficult of construction, but the registration clauses may, I think, be so read as to harmonize them with the wide and general language of sections 2, 4, and 5.

The lien, no doubt, arises from the employment and doing the work or supplying and placing the materials; but the right to register the claim, which is given by section 16, imports some advantage or object to be gained by registration. But for section 19, it might have been thought that it was merely intended to extend the time within which proceedings might be taken to enforce the lien. That section follows the three sections which deal with registration, and enacts that *where* a claim is so registered, the person entitled to the lien shall be deemed a purchaser *pro tanto*, and within the provisions of the Registry Act. The proper inference to be drawn from this is, that to place the lien-holder in that position and give him priority over a subsequent purchaser, he must register his lien as the Act enables him to do. If the mere existence of the lien created a claim paramount to all interests subsequently acquired in the land, the declaration in section 19 would be unnecessary; and, therefore, when we find the right to register conferred, with a declaration of the result which is to follow from registration, it must, I think, be inferred that the right was given for the purpose of maintaining the lien against a subsequent purchaser, and also to protect the latter from the risk of taking the land without notice of, and yet burdened with the lien.

This construction bare justice towards the subsequent purchaser demands, and at the same time it imposes no hardship upon the claimant, since the Act enables him to register his lien before or during the progress of the work or within thirty days after its completion. He is thus practically always in a position to protect himself against

any transfer by the owner with whom he may have contracted and during whose ownership the lien arises.

Judgment.

OSLER,  
J.A.

Section 19, it is true, says that except as herein otherwise provided the Registry Act shall not apply to any lien arising under the Act. It seems to me to be expressly provided, that for the purpose of putting the lien-holder in the position of a purchaser *pro tanto* as against those who may acquire interests in the land subsequent to the creation of this lien, the Registry Act shall apply, and therefore that the case of the lien-holder and subsequent purchaser comes within the exception. As supporting this view it is not without significance that since the judgments in *Hynes v. Smith*, 27 Gr. 150 (1879), and *McVean v. Tiffin*, 13 A. R. 1 (December, 1885), the law as regards the liens of which I have been speaking has been re-enacted in substantially the same terms; and that the Act of 1882, which gave the wages lien and which by section 17 was to be construed as one Act with, and was to be carried out by proceedings under, the Mechanics' Lien Act, was specially amended by the Act of 1887, 50 Vict. ch. 20, sec. 1, which declares that such lien shall within the period during which it may be pursued "have the same priority for all purposes after as before registration." The wages lien is thus expressly placed upon a different footing from other mechanics' liens. I see no reason to recede from anything actually decided in *McVean v. Tiffin*, 13 A. R. 1. It did not become necessary to determine the effect of notice of the lien to the subsequent purchaser or mortgagee, and that is all I meant to point out by what I there said as to notice. But if the lien exists and the purchaser has notice of it there is no reason why he should not be held to take subject to it, and then the right to register the claim for the purpose of extending the time for taking proceedings may also well be held to exist against him, as it would have done against the former owner had there been no transfer. I agree with what has been said by the learned Chancellor as to this in *Reinhart v. Shutt*, 15 O. R. 325, and *Wanty v. Robins*, 15 O. R. 474.

Judgment.

OSLER,  
J. A.

I think, therefore, that at the time this action was commenced the defendant had a valid lien. My difficulty is to see how in such an action, brought for the purpose of vacating it, the lien-holder can, consistently with the other provisions of the Act, enforce it without complying with those conditions which the Act declares to be essential. The plaintiff may fail to prove that when he brought his action the lien was gone or was invalid, and then his action must be dismissed; but if the defendant wants to enforce the lien against the land, must he not take the proceedings required to be taken in order to preserve it?

He may, I suppose, counter-claim in the action and so far be regarded as *rectus in curiâ*, the counter-claim being a separate action, but can he in that counter-claim dispense with any proceeding which the Act declares to be as essential as the action to the preservation of the lien? I doubt it. The proceeding is a statutory one for a judgment *in rem* against the land. Such a lien I regard as very different from a vendor's lien, or one arising out of contract; and if the land is to be fixed with it, the statutory remedy must be pursued. As has been said more than once, the remedy by means of a mechanics' lien is an unusual one, not known to the common law, and depends upon a substantial and reasonable compliance with the provisions of the statute to secure its validity.

What the Act says is, (section 23): "Every lien which has been duly registered under the provisions of this Act, shall absolutely cease to exist after the expiration of ninety days, *unless*, in the meantime, proceedings are instituted to realize the claim under the provisions of this Act, *and* a certificate thereof (which may be granted by the Court or Judge before whom or in which the proceedings are instituted) is registered in the registry office of the registry division wherein the lands in respect of which the lien is claimed are situate."

The defendant appears to have brought an action to enforce his lien, a certificate of which he has registered, but whatever may be the position of that case is it not the



proceeding in which his claim is to be worked out? The registration of the certificate of *lis pendens* is made as essential to the preservation of the lien as the institution of the proceedings themselves and both are as essential to it as was the original registration to preserve it for ninety days instead of thirty. There is no suggestion that anything of that kind was done in the present action upon filing the counter-claim, and with all deference, I am unable to agree that a registration in the other action can on any general principle or rule of practice be made of any avail by the defendant in this. That essential thing having been omitted in the proceeding under which the defendant is now seeking to enforce his lien, the claim for the lien is not properly brought, or before us, in this action, and therefore there is nothing to which we can apply the general powers of amendment which exist under the Judicature Act, as they have existed to very nearly the same extent for many years before that Act was thought of. If it be intended that proceedings shall be actually taken under this decree, as the defendant contends they may be, if the declarations it contains are to be deemed effectual to support a reference in this action, or for any purpose than as in aid of the proceedings in the other action, then I think they are improperly made and that the judgment should be varied by striking them out, leaving it to stand simply as a dismissal of the action.

Judgment.

OSLER,  
J.A.

In other respects the appeal should be dismissed, and I do not see why it should not be with costs.

MACLENNAN, J. A.:—

The learned Judge has found that the defendant's lien for materials supplied by him was valid against the land in question, when the land was conveyed to the appellant on the 25th of September, 1889, and when the conveyance was registered in the proper registry office on the same day. He has also found as a fact that at and before the time of the execution and registration of the plaintiff's

Judgment.

MACLENNAN,  
J.A.

conveyance he had notice and knowledge of the respondent's lien. The appellant has not satisfied us that either of these two conclusions of the learned Judge is erroneous. We think the learned Judge was well warranted by the evidence in finding that when the appellant took and registered his conveyance, he had notice and knowledge of the respondent's lien; and there can be no good reason for putting a different construction upon the registry laws when they are invoked against a mechanics' lien, and when invoked against other liens recognized by law.

We must therefore affirm the judgment which upholds the integrity and validity of the lien.

It was, however, contended before us by the appellant that although the lien might have been good and valid at the time when the present action was brought it was lost by matter subsequent, and that on that ground his appeal ought to succeed and that this Court ought to declare that the respondent's lien is gone.

To understand and dispose of this objection it is necessary to refer with some particularity to the facts, and to the proceedings which were taken by the respective parties.

[The learned Judge stated the facts and continued:]

It may be that if the respondent had put his defence or his claim to relief distinctly in the form of a counter-claim, he could also have obtained and registered a certificate of *lis pendens* in compliance with the provisions of section 23 of the Mechanics' Lien Act, and would then have been quite safe against the effect of a discontinuance by the appellant. I do not see why he could not have done so. All that section 23 requires is that proceedings should be instituted to realise the claim under the provisions of the Act, and a certificate thereof registered, and sections 28 and 29 provide that the proceedings shall be according to the usual procedure of the respective Courts in which they are brought. I therefore see no reason in the world why the proceedings mentioned in section 23 might not be by counter-claim as conveniently and effectively as by action.

By Consol. Rule 373 a defendant in an action may set up by way of counter-claim against the claim of the plaintiff any right or claim whether the same sound in damages or not, and by 373 (a) a counter-claim shall have the same effect as a statement of claim in a cross action so as to enable the Court to pronounce a final judgment in the same action both on the original and on the cross claim. And in *McGowan v. Middleton*, 11 Q. B. D. at pp. 464, 468, 472, it was held that discontinuance after counter-claim does not put an end to the action as regards the counter-claim.

Judgment  
MACLENNAN  
J.A.

The respondent did not put his defence or his claim to relief in respect of his lien in the form of a counter-claim, although he alleged all the facts, and claimed relief in respect thereof, but he brought an independent action as already mentioned.

It is quite clear in my opinion that there were now two actions pending in either of which all the rights and liabilities of the appellant and the respondent in respect of the lien in question could be worked out and determined.

There can be no question that this could be done in the action of the respondent, for he had filed a certificate of *lis pendens* as required by the Act; and I think it is equally clear as regards the present action. This follows from section 52 of the Judicature Act, especially sub-section 12, which provides that the High Court and the Court of Appeal in every cause or matter pending before them, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to them shall seem just, all such remedies whatsoever as the parties thereto may appear to be entitled to in respect to any and every legal or equitable claim properly brought forward by them respectively in such cause or matter, so that as far as possible all matters so in controversy between the said parties respectively, may be completely and finally determined, and all multiplicity of legal proceedings concerning any of such matters avoided. The wide scope of this enactment will be seen on referring to the notes to this section in Langton's Judicature Act, pp. 45 and 46, and the cases there cited;

Judgment. and to Wilson's Judicature Act, p. 20, and the notes to the  
MACLENNAN, J.A. corresponding section of the English Judicature Act.

By this section, all that is required to give jurisdiction is, that a claim shall be properly brought forward by any party either plaintiff or defendant, and if that is done, the Court is to grant the proper remedy ; and as I have pointed out, the respondent did, in the present action, set out in his statement of defence all the facts of his claim, and he also claimed the appropriate relief.

But it may be said, that not having registered a certificate of the proceedings in the present action, he is precluded from getting relief by reason of section 23 of the Act ; and that his doing so, is something in the nature of a condition precedent.

There are, in my opinion, two answers to that objection. The first is, that he had done the very thing the Act required. He had commenced proceedings, and he had registered a certificate. Having done that within the ninety days, the penalty was avoided and the lien was preserved ; and being preserved, there was no reason why he should not get the benefit of it in the other action.

The other answer is that the appellant had notice within the ninety days of the respondent's proceeding for the recovery of his claim. I refer to his statement of defence, and that I think must be held to take the place of registration, in accordance with the construction which has been put upon section 83 of the Registry Act. That section declares that no equitable lien shall be deemed valid in any Court against a registered instrument, but it is well settled that that only means where the grantee in the registered instrument is without notice of the lien. Here the Legislature intended to secure notice, by registration of proceedings instituted for realization of the lien within ninety days after completion of the contract, in cases like the present.

The respondent did not serve his process in the action brought by him, and I think he is to be commended for not doing so, as he had twelve months within which to do it,



and his so doing might turn out to be a useless expense, so far as the appellant was concerned, if the latter succeeded in the action.

Judgment.  
MACLENNAN  
J.A.

The appellant's action was carried down to trial, and it was disposed of and judgment reached on the 27th day of February, 1890, long before the twelve months had expired.

The appellant failed in his action, and the learned Judge so far complied with section 52 (12) of the Judicature Act as to declare that the respondent had, as against the appellant, a lien on the land in question for the amount due to him from Jordan, on his contract, but he made no order or direction for the realization of the claim.

As far as it went the judgment of the learned Judge was undoubtedly right, but I think in an action such as this which concerned a lien and nothing else, and in which both the landowner and the lien-holder were before the Court, both parties ought to have received under the section of the Judicature Act referred to, all the remedies they were entitled to in respect of all claims properly brought forward, and to have had all matters in controversy between them completely and finally determined. The judgment, therefore, in my opinion, ought to have gone on to direct a reference to have the lien realised in the usual way by a sale of the land or of a competent part thereof.

In his reasons of appeal, the ground urged by the appellant is, that the respondent should have served his process within ninety days from the 20th of September, 1889, the day on which the contract was completed. We are clearly of opinion that in that form the objection is untenable. But the appellant urged before us in argument that his name having been stricken out of the summons by the respondent, it was now the same as if the respondent had never commenced any action at all against him, and that the lien had therefore ceased by force of section 23. To make this objection understood, it must be stated that when the respondent had obtained the judgment of the Court in the present action on the 27th of February, he thought there

Judgment. was no use in going on with the other action against the  
MACLENNAN, appellant, and so he obtained an order to amend his sum-  
J.A. mons, and he amended it by striking out the appellant's  
name as a defendant. The latter now contends and  
argued before us as above mentioned, that by that amend-  
ment, the respondent is now in the same position as if he  
had never brought an action at all against him to enforce  
his lien.

I am, however, clearly of opinion that such is not the case; and that the respondent's lien having been in existence and in unimpaired force at the time of the judgment, and having been crystallized, as it has been phrased, into a judgment, the latter could not be got rid of by anything done afterwards but by satisfaction or release. It is as if, after judgment on a promissory note, bond, or covenant, the original instrument was destroyed or cancelled, or even delivered up to the debtor, that would not get rid of the judgment or impair its force or validity. The judgment is now the obligation, and the original obligation is of no consequence, it is exhausted; *transit in rem judicatam*.

It is hardly conceivable that under the old practice of the Court of Chancery, which Court alone would have had jurisdiction in a case like the present, such a judgment as we have before us would have been pronounced in the case of a claim or demand actually due and payable, without at the same time directing proceedings for enforcing it against the land by sale, and so giving the party the fruits of the litigation. But if there were such a judgment the party would at once have been entitled by supplemental bill under the older practice, and by supplemental petition under the more recent practice, to have his judgment carried into effect. The judgment would itself be a cause of action enabling him to come to the Court for relief. So here, the present judgment having been properly obtained the respondent is entitled to the aid of the Court to obtain its fruits.

In my judgment the learned Judge should have directed the usual reference for the realization of the lien by sale

of the land or a competent part of it, as in other similar cases. And as we have the power to pronounce the judgment he should have pronounced, under section 47 of the Judicature Act, and as it is expressly made the duty of this Court by section 52 (12) of the Act, to grant all the remedies any of the parties appear to be entitled to so that all matters in controversy between them may be completely and finally determined, I think we should direct that reference now.

Judgment.  
MACLENNAN,  
J.A.

The appeal should therefore, in my opinion, be dismissed with costs, and the judgment should be varied as above indicated.

HAGARTY, C. J. O., concurred with MACLENNAN, J. A.

*Appeal dismissed with costs.*

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CAMPBELL V. THE KINGSTON AND BATH ROAD COMPANY  
AND JOSEPH RYDER.

*Way—Tolls—Road company—Lease of tolls—R. S. O. (1887) ch. 159.*

A company incorporated under the General Road Companies' Act, R. S. O. (1887) ch. 159, may validly lease a toll gate and the right to collect tolls thereat : HAGARTY, C. J. O., dissenting.

Statement.

THIS was an appeal by the defendant company from the judgment of the Queen's Bench Division.

This action was brought by the plaintiff, a married woman, to recover damages for injuries sustained by her while walking past a tollgate on the Kingston and Bath Road on the night of the 16th of October, 1889. The defendants, the road company, were incorporated under "The General Road Companies' Act," R. S. O. (1887) ch. 159, and were the owners of the road upon which the accident happened.

On the 1st of May, 1889, the defendant Ryder purchased from them the right to the tolls at the gate in question for one year from that date. In order to enable him to collect the tolls he was allowed to live in the toll-house with his family. He was under no obligation to keep the road in repair. His agreement was not in writing and he had no rights or duties beyond the collection of the toll and the payment of the notes which he gave the company for the sum he had agreed to pay them for the right to receive the tolls. These notes were payable monthly in advance.

The toll-house extended to the edge of the travelled part of the road. In front of it was a short boardwalk which encroached somewhat upon the travelled part of the road. On the opposite side of the road was a post upon which the toll gate swung freely. Attached to the end of the the gate farthest from the post was a chain which was used to hold the gate shut at night. Sometimes the loose end of the chain was put through a staple under the boardwalk when the gate was shut, but more frequently it was carried across the boardwalk and held by a large



stone against the side of the toll-house. Upon the night Statement. in question the plaintiff and her daughter were returning on foot from Kingston at about eleven o'clock. The toll gate was shut and the plaintiff walked along the board-walk which was the ordinary path used by foot passengers when the gate was closed. She tripped over the chain and falling into the road received the injuries complained of. It did not appear whether the chain was put through the staple or fastened by the rope at the time.

The action was tried at Kingston on the 7th of May, 1890, before Armour, C. J., and a jury. The action was not defended by Ryder.

The following were the findings of the jury :

1. Was the passage between the toll-house and the toll-gate at the time of the accident in a reasonable state of repair, and reasonably safe for foot passengers? No.

2. If not, were the defendants guilty of negligence in not having it so? Yes.

3. Did such negligence cause the injury to the plaintiff? Yes.

4. Was the plaintiff at the time of the accident using ordinary care and caution. Yes.

5. Was the gate and were its attachments—the gate and attachments furnished by the defendant company to Ryder for the purpose of collecting toll? Yes.

6. Was the manner in which the gate and its attachments were fastened at the time of the accident the manner in which Ryder was authorized by the defendant company to fasten it? Yes.

7. What damage did the plaintiff sustain by reason of the negligence of the defendants? \$500.

Judgment was reserved and was subsequently given in favour of the plaintiff, the reasons for judgment being as follows :

“I am of opinion that this case is not governed by the decision of *Price v. Cataraqui Bridge Company*, 35 U. C. R. 314. The Act incorporating the Cataraqui Bridge Company, 8 Geo. IV., ch. 12, contains provisions of a

Statement. very different character from that incorporating the defendant company, and there is no power in the latter Act, as in the former, in the company to demise.

The view that I held at the trial and that I still retain is that the arrangement made between the defendant company and the defendant Ryder did not create the relation of landlord and tenant, but of master and servant, and as I find whatever was done by Ryder which caused any injury to the plaintiff was done by him in the course of his employment, the defendant company are liable therefor.

In *Corporation of Ancaster v. Durrand*, 32 C. P. 563, the Court of Common Pleas seem to lean throughout to the view that the Road Companies' Act gave power to the companies incorporated under it to demise, but it was not necessary for them to so hold for the decision in that case, and the Court seem rather to express the view that I have expressed when they say in that case: 'They in effect appoint a collector of the tolls, paying him not by salary or percentage, but by giving to him for his own use all that is received by him above a particular sum which they reserve to themselves, the collector running the risk of the sum reserved being collected in consideration of his being allowed to retain for his own use the whole that he may collect above that sum.'

I am of opinion, therefore, that under the law and the findings of the jury the defendant company is liable for the injury sustained by the plaintiff: *Bennett v. Covert*, 24 U. C. R. 38; *Hamilton v. Covert*, 16 C. P. 205; *Hinckley v. Gildersleeve*, 19 Gr. 212."

The defendants, the road company, moved before the Divisional Court at the Easter Sittings for a new trial or for the entry of a non-suit upon the ground that the findings were against evidence; that the plaintiff was guilty of contributory negligence; that the road company were not liable to the plaintiff because they were under no duty to her as a foot passenger only; that the toll gate and tolls were under lease to the defendant Ryder at the time of the accident, and that the company were therefore not re-

sponsible for his management of the toll gate ; that the Statement. damages were excessive.

The motion came on for argument on the 27th of May, 1890, before FALCONBRIDGE, and STREET, JJ., and was subsequently dismissed with costs, the judgment of the Court being delivered by STREET, J., as follows :

“I see no reason for interfering with any of the findings of the jury upon the matters submitted to them. The evidence offered was sufficient to justify the conclusions at which they arrived, and the damages do not appear to be excessive under all the circumstances. Nor have I been able to satisfy myself that the defendants can escape liability because of the fact that they had let the tolls at this gate to their co-defendant Ryder. Section 99 of the Act imposes upon the company the duty of keeping the road in repair, and the jury have found that it was not in a reasonable state of repair at the place where the accident happened, and that their negligence was the cause of the accident. Their duty was a statutory one, and they could not delegate to others the performance of it so as to exempt themselves from liability to the public : *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488. It is urged by the road company that the act of obstructing the highway with the chain which caused the accident was not their act, but the act of their tenant, and that they had no notice of it. But the jury have found, and the evidence warrants the finding, that the road company furnished to Ryder the gate and chain, and that he used them in the manner authorized by them. So that the facts come down to this : That the road company let to Ryder the right to collect the tolls and placed him in occupation of the toll-house ; that they then handed him a chain and told him he might stretch it across the highway in a particular manner in order to keep the gate closed ; that he did as he was told and that the accident was the result. Upon this state of things it seems to matter little what his position was. Whether he was tenant or servant he was doing what he was told to do

## Statement.

upon the road for the repair of which they were responsible. *Price v. Cataraqui Bridge Co.*, 35 U. C. R. 314, was relied upon by the road company as governing this case, but appears to be readily distinguishable. The majority of the Court there thought that the bridge company in any event would not be liable, even had no tenant intervened, because they were not bound to fence the drawbridge against runaway horses; but considered that if anyone were liable it would be the lessee and not the bridge company. Wilson, C. J., agreed that the company were not liable, but thought that the lessee, who was not before the Court, would have been liable because he had not managed, with due regard to the safety of the public, certain gates which were in good order and had been placed under his control as their tenant by the bridge company. In that case there was negligence on the part of the tenant in the performance of his duties. In the present case the negligence was on the part of the road company in supplying Ryder with an improper means of closing the gate, and there was none on his part as between him and them in making use of the means so supplied to him.

There is no force in the objection that the road company were under no obligation to the plaintiff because she was on foot. The road was a common highway along which she had a right to pass. The defendants by their gate shut her out from any passage but the one she took, and it was a question for the jury whether that portion of the road was in proper repair. They have found that it was not, and she is entitled to damages. She had a right to travel on the road and to expect to find it in reasonable repair even though not liable to pay toll.

In my opinion the motion should be dismissed with costs."

The defendant company appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 26th and 27th of January, 1891.



*Britton*, Q. C., and *Langton*, Q. C., for the appellants. Argument.

There was no evidence to justify the findings as to want of repair and negligence, and there is undisputed evidence of contributory negligence, the plaintiff having no legal right to be on the footway at all: *Steinhoff v. Kent*, 14 A. R. at p. 16; *Jones v. Grand Trunk R. W. Co.*, 16 A. R. 37. At all events the company are not responsible. There is no obligation upon them to collect tolls. They merely have the privilege of doing so, and may without doubt transfer that privilege to another. That would not be an attempt to delegate to another the fulfilment of a statutory duty. Ryder was a lessee and not a servant, and no responsibility attaches to the company for acts done by him without their direction or authority. The statute clearly recognizes this right to lease. See sections 129, 156, and see also *Corporation of Ancaster v. Durrand*, 32 C. P. 563. Ryder had the right to collect tolls and reside in the toll-house, and the case clearly comes within the case of *Price v. Cataraqui Bridge Co.*, 35 U. C. R. 314. The relationship between the company and Ryder is very like that between owner and contractor: *Stretton v. City of Toronto*, 13 O. R. 139; *Murphy v. City of Ottawa*, 13 O. R. 334; *Jones v. Corporation of Liverpool*, 14 Q. B. D. 890. Ryder was not under the control of the company, and they had no right to dismiss him, and the right to dismiss is the test of the relationship of master and servant: *Scott v. Mayor of Manchester*, 2 H. & N. 204. The case of *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, is distinguishable. The defect there in question was one for which the defendants were admittedly responsible. The gate was in proper order when placed in Ryder's control, and his subsequent misuse of the appliances furnished does not impose liability on the company: Addison on Torts, 6th ed., p. 376; Pollock on Torts, 2nd ed., p. 371.

*John McIntyre*, Q. C., and *Lyon*, for the respondent. The company were bound to keep the road in repair: R.

## Argument.

S. O. (1887), ch. 159, secs. 90, 99, and 140; R. S. O. (1887), ch. 184, sec. 531. The road was not, legally speaking, in repair when an obstruction like that complained of was on it: *Hewison v. City of New Haven*, 34 Conn. at p. 142; *Hixon v. City of Lowell*, 13 Gray 59; Harrison's Municipal Manual, 5th ed., p. 487. To say that the company owed no duty to the plaintiff, a foot-passenger paying no toll, is absurd. Travellers in charge of vehicles pay no toll unless they pass through a toll gate: *Vanderlip v. Smith*, 32 C. P. 60; and by a parity of reasoning a road company would owe them no duty. That is to say a road company could assume one of Her Majesty's highways and allow it to fall into disrepair with impunity towards all persons, except those who pass through a gate and pay toll. The company had no right to lease, but even if they had, that is not decisive of the defendant company's liability. They could not divest themselves of their liability, merely by making a lease. See *Carty v. City of London*, 18 O. R. 122; *Grassick v. City of Toronto*, 39 U. C. R. 306; *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488. The defendant Ryder could not vicariously incur the liability of the defendant company, nor could the defendant company take refuge behind him, unless the act leading to, or the immediate cause of the accident, was something collateral to the subject matter of the duty or employment cast upon him and not necessarily incidental thereto: *Wheelhouse v. Darch*, 28 C. P. 269; *Hughes v. Percival*, 8 App. Cas. 443; *Toronto Street R. W. Co. v. Dollery*, 12 A. R. 679; *Bower v. Peate*, 1 Q. B. D. 321. The public, and amongst others the plaintiff, had a paramount right to use the highway: *Regina v. Train*, 3 F. & F., 22 per Erle, C. J., at p. 27. Therefore a duty was cast upon the defendant company to see that the proper precautions were taken by the defendant Ryder, whether he were their servant, employee, agent, contractor or lessee: *Toronto Street R. W. Co. v. Dollery et al.*, 12 A. R. 679, at p. 707. The use of the gate and its attachments was necessary for the proper and convenient collection of

Argument.

the toll by the defendant Ryder; and was not used by the defendant Ryder whimsically or capriciously; hence it became and was the duty of the company to lease the gate to the defendant Ryder properly equipped. And their authorization to use the chain and stone in the way in which he used them might be implied from long user, acquiescence, or public notoriety. If the defendant company were negligently ignorant, they were guilty of negligence, and that would render them liable: *The Mersey Docks and Harbour Board v. Penhallow et al*, 7 H. & N. 329; *Thompson v. North Eastern R. W. Co.*, 3 L. T. N. S. 618; 7 Jur. N. S. 307; *The Sub-Marine Telegraph Co. v. Dickson*, 15 C. B. N. S. 759; *Castor v. Township of Uxbridge*, 39 U. C. R. 113. Or in any event it was the defendant company's duty to provide a proper mode of fastening, which the evidence shows they did not do, and this neglect was by implication authority to the defendant Ryder to adopt the use of the stone and chain, which the evidence shows had been in use for several years and by previous toll collectors. The defendant Ryder was not a lessee but collected the tolls under an arrangement by which he had to pay or account for a fixed sum to the defendant company, and was entitled to keep the excess for his own use and benefit: *Township of Ancaster v. Durrand*, 32 C. P. 563. There was no demise, but merely a parol license: *Wood v. Leadbitter*, 13 M. & W. 838. The knowledge of the defendant Ryder is the knowledge of the defendant company, unless he was a contractor or lessee, but if the latter, his negligence in the course of his employment does not remove the liability of the defendant company: *Gray v. Pullen*, 5 B. & S. 970.

*Britton*, Q. C., in reply.

March 10th, 1891. HAGARTY, C. J. O. :—

The defendant company is incorporated under the general Act, R. S. O. (1887), ch. 159. No power is given in terms to lease or demise the tolls, etc. The Act follows in substance the old U. C. Consol. Act on the same subject.

Judgment.

HAGARTY,  
C.J.O.

The only reference to or mention of any leasing, etc., is in sec. 129, where the words are: "If any person being either the renter or collector of tolls of any gate on any road," (these words are in the Act 16 Vict. ch. 190, sec. 37) "take a greater toll than is authorized, he shall forfeit and pay a penalty;" and in sec. 98: "Nothing herein contained shall affect the rate of toll which any party is entitled to collect under any lease or contract executed before the 14th of June, 1853."

This is copied from the former revise and sec. 94 of C. S. U. C. ch. 49, which latter refers back to 16 Vict. ch. 190, sec. 40. Under this Act the company may sell the road to the municipality (sec. 25) or the latter may sell to a company (sec. 26). Section 40 at the end declares that nothing therein contained shall affect the rate of toll which any party may be entitled to collect under any lease or contract executed before the passing of the Act.

There is also a reference in sec. 156, declaring the three preceding sections as to municipal powers as to shade trees and of making the crossings, sewers, etc., to be binding on any lessee or owners of such road, whether a joint stock company or not. This is a general power as to roads under this Act, unconnected with any power as to tolls. It is taken from a short Act, 47 Vict. ch. 24 (O.).

I have looked at the earlier Acts 12 Vict. ch. 84, and 13 & 14 Vict. ch. 14. They are all to the like general effect and beyond the expressions above quoted contain nothing bearing on the question of leasing tolls.

It is to be remembered that the sections apply to roads belonging to a municipality as well as to roads in the hands of a company.

As is pointed out in *Corporation of Ancaster v. Durrand*, 32 C. P. 563, by Wilson, C.J., the municipality must have such power as an incident to their ownership and right of property.

This judgment seems to be clear that their right to lease and demise the tolls is very different from any supposed right of a company so to do, unless allowed by their charter.



The English Turnpike Acts contain special provisions authorizing the leasing of tolls, and very distinct and precise directions are given as to how this power may be exercised and security taken. The powers are fully set out and commented on in such works as Oke's Laws of Turnpike Roads, pp. 3, 4; Glen's Law of Highways—*passim*. Besides the power to demise special provisions were inserted to enable them to appoint toll collectors, clerks, surveyors, and treasurers, and to remove and appoint others, and out of the moneys arising on the road to pay salaries, and the law provided for the two cases, the letting and demising of the tolls and their collection by the collectors and servants of the trustees.

Judgment.  
HAGARTY  
C.J.O.

Section 55 of the general Act, 3 Geo. IV. ch. 126, gives full powers of leasing, and of farm-letting the tolls, "although no express power shall have been given by any Act for the purpose," giving very full and special directions as to the manner. The particularity required is exemplified by such cases as *Bell v. Nixon*, 9 Bing. 393.

Turnpike road trustees were of course in a different legal position from that of a commercial stock company like the present defendants, and the proposition we have to deal with is, whether the defendant Ryder was the tenant or lessee of the tolls so as to place on him the sole responsibility to answer the plaintiff's claim, or whether he was not merely the servant or agent of the defendant company, employed to collect their tolls, receiving a certain portion thereof in payment for his services.

The case chiefly relied on by the defendants was *Price v. Cataraqui Bridge Co.*, 35 U. C. R. 314.

Under the company's charter they were specially empowered by section 16 to let and to farm-let the tolls to any person, and such person should receive the tolls and recover the same penalties for non-payment thereof as the company could do; and by 7 Vict. ch. 60 it was directed that the toll-keeper or other person appointed to receive the tolls at the bridge, should open the drawbridge for vessels subject to a penalty named. The Court held that the liability (if any)

Judgment.  
HAGARTY,  
C.J.O.

for the loss of the plaintiff's horses which fell into and were drowned at the open bridge, was on the lessee of the tolls, and not on the demising company.

*Corporation of Ancaster v. Durrand*, 32 C. P. 563, upheld a demise by the municipal corporation to a person resisting payment on the ground of the non-existence of power to demise. But it was on the ground of such a power being inherent in the municipality as the owner of the road, and the learned Chief Justice Wilson says at p. 569: "It is in no way like the demise by a railway company of its line and privileges. The plaintiffs control the road and the tolls. They are responsible for its repair. The railway is the very object and purpose of incorporation. If that is parted with or the essential rights of the company parted with, the franchise is improperly dealt with. So it was when turnpike trusts existed in England and so it would be here if a road trust were created without any special power of leasing."

In reference to the defendant Ryder's position these words may be applicable. "They, in effect, appoint a collector, paying him not by salary or percentage, but by giving to him for his own use all that is received by him above a particular sum which they reserve to themselves, the collector running the risk of the sum reserved being collected in consideration of his being allowed to retain for his own use the whole that he may collect above that sum."

I am of opinion that in the absence of express power given by the Legislature to demise or lease, the defendant company cannot absolve themselves from liability for such a cause of action as is here urged.

I cannot look upon Ryder as occupying any position higher than that of collector of the tolls for the company; that they are the parties in complete possession and charge of the tolls, toll-houses and road through him as their servant and agent; and, as in other cognate cases, answerable for his neglects and omissions in the performance of the duties devolved on him.

No company of this nature can, as I think, part from the

full due performance of their permitted duties or devolve such performance on others, except by express permission of the Legislature, and that no such power can be properly implied.

Judgment.  
HAGARTY,  
C.J.O.

The whole scope of our Act seems to me to contemplate a direct action and an equally direct responsibility of the company to the public.

It is not necessary for my view to press it to the extent that they cannot let the tolls in the sense of agreeing to take so much for their share, leaving the surplus to the actual tolltaker or renter, if they care to use the term. They cannot, as I hold, shift to his shoulders from their own the responsibility to the public.

It appears in evidence that for several years in the month of May, the defendants put up the tolls to auction, and Ryder had been for four successive years the person offering the best terms, and each time giving endorsed notes payable monthly for the named sum to be paid to the company, he receiving the overplus for himself. He is put in possession of the toll-house and appurtenances.

This accident occurred in October, the last auction being in the preceding May. The gate had been erected by the company. Ryder had no duty as to repair.

It appeared from the architect Gillen's evidence, that the gate would not swing exactly plumb across the road. It would swing the way it is opened. The hook at the end of the chain would be attached either to the staple in the plank or was brought under a stone, that for years had been laid against the wall. Gillen says that if the chain were only hooked to the staple, the gate would swing open the whole length of the chain, if not drawn through the staple; and if drawn through a person would be apt to trip upon the chain.

Ryder says he had been there four years and that the chain, the staple, and the stone were there when he came and ever since, and that at night sometimes he passed it through the staple. "Sometimes we took the chain down against the side of the house and put a stone

Judgment. on the top of it to keep it from coming open," and the  
HAGARTY, stone was there for the same purpose four years before.  
C.J.O. To use the stone was the handiest way.

His wife's evidence is in substance to the same effect.

There is other evidence as to the stone being there for years—known to some of the company's officers, but they say they did not know how it was used.

It would seem that the plaintiff received her injurious fall from the fact of the chain being fastened, not at the staple, but at the stone, which raised it some distance above the ground between the plank walk and the end of the gate. One witness stated that on or about the same night, he tripped over the chain fastened, as he said, outside the building, the other end being attached to the frame of the gate about a foot from the bottom.

Declining to accept the defence raised as to exemption on the ground of a lease or demise, I see no reason to interfere with the verdict on the general merits.

It was wholly a question for the jury, and I cannot see any misdirection.

It is clear that this passage was left by the defendants for foot passengers at night, and I think they were legally bound to see that it was kept in a reasonably safe state for that purpose.

There was evidence proper to be submitted to the jury, and I think it was fairly left.

BURTON, J. A. :—

This is an action of negligence against the road company and against a person of the name of Ryder, who at the time of the accident filled the position of gatekeeper and lessee of the tolls. The learned Judge at the trial relieved the jury of any question as to the position of the defendant Ryder, but for the purpose of the enquiry treated him as the servant of the company doing the bidding of the company, the company being equally liable with him, adding one or two questions framed with a view to deciding on



Judgment.

BURTON,  
J.A.

the liability of the company in the event of Ryder being eventually held to be a lessee of the company and not merely a servant or agent, and he reserved that as a question of law for further consideration, subsequently holding as a matter of law that Ryder occupied the position of servant to the company, and that what he did, being done in the course of his employment, the company are liable for the damages resulting from the act complained of, and I am not at all prepared to say that if that was the relationship between the parties that the verdict might not properly stand.

I must confess, however, that I am unable to discover upon what principle the obligation to keep the road in repair which is referred to in the judgment of the Divisional Court as a ground for making the company liable, can in any way affect this case; if the road was out of repair the company would be liable for any damage sustained by one of the public by reason of its being in disrepair, but the other defendant would incur no responsibility on that account, and in fact, as the learned Judge at the trial pointed out, the road was in a perfect state of repair. What is complained of here is the placing of what it is alleged was a dangerous obstruction on the highway, and if that was so, and the other defendant was the servant of the road company, and acting within the scope of his employment, it goes without saying that they would be equally liable with him; but if he was not their servant, and he was using this chain as a fastening to the gate in a way in which he was not authorized by the company to use it, it appears to me to be equally clear that they cannot be made responsible.

I do not think it necessary to offer any opinion as to whether the use of the chain in the only way in which the company had authorized its use, would or would not have been an obstruction which, in the event of damage, might have made the company responsible; it is sufficient to say that the accident did not result from any such user of the chain, and that it is a conundrum therefore which I am not called upon to answer.

Judgment.

BURTON,  
J.A.

But I am unable to agree with the learned trial Judge that the defendants in this litigation occupied the relative position of master and servant, on the contrary I think it clear that he was their lessee entitled for the full period of one year to the use of the toll-house and the gate, and to the exclusive right to the tolls.

I do not for a moment suppose that the company being under a statutory liability to keep the road in repair could relieve itself of that or any other statutory liability by leasing the road to another; that may be said to be elementary law, and the case of *Hole v. Sittingbourne and Sheerness R. W. Co.*, 6 H. & N. 488, referred to in the judgment of the Court below, proceeded upon that principle, but it has no application to the present case.

It is said that this case differs from that of *Price v. Cataraqui Bridge Co.*, 35 U. C. R. 314, because there there was an express power to demise, but it is a distinction without a difference. I should have thought, although it is not necessary to decide the point, that a company incorporated under the Joint Stock Companies' Acts, a commercial company, would have as an incident to its incorporation an inherent right to lease its tolls. If Sir Adam Wilson in *Corporation of Ancaster v. Durrand*, 32 C. P. 563, intended to draw a distinction, (which I feel confident he did not) between the right of a municipality and a joint stock company to demise these tolls, I should be compelled to differ from that learned Judge, but that he did not intend to do so is I think manifest from a passage near the end of his judgment, where he says:

"The 128th section of R. S. O. ch. 152, appears to apply to all toll roads, whether held by municipal or joint stock bodies, or by a purchaser, and in that section the renter or collector of tolls is expressly mentioned."

The company had power absolutely to sell to an individual, or it might be sold under execution.

And a similar section is to be found in all the Acts from their original introduction, and many other expressions which, from the earliest days, shew a clear recognition and

an implied authority to grant such demises, as *e. g.*, this clause in 16 Vict. ch. 190. "Nothing herein contained shall affect the rate of toll which any party is entitled to collect under any *lease* or contract executed before 14th June, 1853."

Judgment.  
BURTON,  
J.A.

There is not the remotest resemblance or analogy between the powers of a commercial company like the defendants, and those of trustees of a turnpike road under the English Acts.

The position, therefore, that the defendant Ryder occupied was that of lessee, and the company are not liable for the lessee's act done quite apart from the contract, and not under or in obedience to it, or by the instructions or direction of the company or any of its officers.

The learned Judge, as I have already mentioned, having in view the fact that Ryder might eventually be found to occupy the position of tenant and not of agent put these additional questions to the jury :

5. Was the gate and were its attachments—the gate and attachments furnished by the defendant company to Ryder for the purpose of collecting toll? Yes.

6. Was the manner in which the gate and its attachments were fastened at the time of the accident the manner in which Ryder was authorized by the defendant company to fasten it?

As to the first of these, it is not, I fancy, disputed by any one that the gate and chain were furnished by the defendant company to Ryder for the purpose of collecting toll, nor was there anything wrong in so furnishing them or in their use; it was the improper user of the chain in a way not authorized by the company which has given rise to the complaint.

Now in the original Act was to be found a section making it criminal for any person maliciously to remove or destroy any toll-house, turnpike-gate, lock chain or other fastening belonging to any tollgate, showing a clear recognition by the Legislature of the right to use the chain as an attachment to a gate.

Judgment.

BURTON,  
J.A.

As to the second of these two questions, which the jury have also answered in the affirmative, all I have to say is that it was not only wholly without evidence to support it, but is directly opposed to the only evidence which was offered on the subject. Not only was it unknown to the company, but one or two directors whose acts could not have bound the company, positively deny that they knew of the manner in which the chain was fastened, and therefore the finding, altogether without a particle of evidence to support it, cannot be invoked to fix the company with liability.

I think it perfectly clear as a matter of law that Ryder was a lessee for whose wrongful acts of this nature the other defendants are not responsible, and that judgment should have been entered for them in the Court below and ought now to be so entered.

OSLER, J. A. :—

I think the appeal should be dismissed upon the findings of the jury, which I see no sufficient reason for setting aside. There is some evidence, not much, but quite enough for the jury to act upon in support of the 5th and 6th findings; and that being so, it matters little whether the defendant Ryder is to be regarded as the lessee of the tolls, or as the servant of the company. If he was lessee of the tolls and toll-house, the company furnished him with the appliances which had been in use for years before the last letting, for fastening the tollgate, and in fastening it with the stone and chain, he was doing no more than the company authorized him to do, as the jury have found. I agree with the judgment of Street, J., in the Divisional Court, on this point. There was evidence that the passage between the toll-house and tollgate was not reasonably safe for foot-passengers, and no one can be surprised that the jury took that view if they believed that the chain which fastened up the gate was strung across the footpath in the dangerous way described by



some of the witnesses. It is not a question merely of the road being out of repair, though it may be said to have been so under the circumstances, but of an obstruction for which the defendants are responsible being placed on the road in such a way as to endanger the safety of foot-passengers.

Judgment.

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 OSLER,  
J.A.

The learned Judge at the trial charged the jury and in his judgment afterwards upon the findings held that the relation between the defendants was that rather of master and servant than of landlord and tenant, being of opinion apparently that the company had no power to farm or demise the tolls, and it is contended that in this there was misdirection, and that a new trial should be granted.

Conceding however that there was misdirection on this point and that in law what was done amounts to a lease of the tolls and tollgate, the 5th and 6th questions and answers fasten the company with responsibility even in that case, and a new trial is unnecessary. I am not prepared, as at present advised, to assent to the view, which I think the Divisional Court carefully refrained from adopting, that a company incorporated as the defendants are, under the general Road Companies' Act, have no power to lease or demise or farm their tolls. It is true that that Act confers no such power in express terms, as does the very old special Act in question in *Price v. Cataraqui Bridge Company*, 35 U. C. R. 314, but secs. 98, 129, 137 and 156 imply the existence of such a power and it is recognized by the legislature as incident to the corporation. Certainly it is one which I am safe in saying has always been exercised by these companies under all the general Acts from 12 Vict. ch. 84 to the present time. The point was expressly taken and overruled in *Regina v. Caister*, 30 U. C. R. 247, where Wilson, J., speaking of the lessee of the tolls, says: "The company may let if not restricted, and the 89th section applies expressly to the 'renter or collector' of tolls." There the company was evidently incorporated under the general Act. I refer also to *Corporation of Frontenac v. Chestnut*, 9 U. C.

Judgment.

OSLER,  
J.A.

R. 365; *Corporation of Huron v. Kerr*, 15 Gr. 265, as cases in which, if it had been thought there was no such power, the objection might have been, but was not, taken. It is wholly different from a power to lease or sell the road and franchises of the company. I cannot apply to the exercise of such a power by a company to whom the tolls legally belong, the decisions under the Turnpike Acts in England as to the powers of the Turnpike Trusts Commissioners, who are not a corporation, who have but a bare authority, and whose powers must be exercised strictly in accordance with the Act under which they derive them, and the general Act: See *e. g. Stott v. Clegg*, 13 C. B. N. S. 619, at p. 629; *Markham v. Stanford*, 14 C. B. N. S. 376; *Shepherd v. Hodsman*, 18 Q. B. 316; and in our own Court, under the Act 3 Vict. ch. 53; *Ireland v. Guess*, 3 U. C. R. 220; *Ireland v. Noble*, 3 U. C. R. 235. In the former case, Robinson, C. J., observes (at p. 227): "In demising the tolls at all the commissioners are merely executing an authority, and they must pursue, in substance at least, the directions by which the authority is limited, or their contract will be invalid: they have no private legal interest in their tolls: they have only a power to demise them upon certain terms."

It has of course not been contended at the Bar that a lease or demise of the tolls can exempt the company from their statutory duty to keep the road in repair, nor has any point been made of the fact that the lease or demise in question was a verbal one only, or at least was not under the seal of the company. Possession having been taken by the renter of the gate, this would probably make no difference: *Mayor of Kidderminster v. Hardwick*, L. R. 9 Exch. 13.

I refer also to *Corporation of Ancaster v. Durrand*, 32 C. P. 563, affirmed on Appeal, 12th of September, 1888, (not reported). There is no statute or other law that I am aware of, which makes the power to lease the tolls inherent in a municipality where it would not be equally inherent in any other owner of the tolls.

There is no ground to interfere as regards the damages, and for the reasons above given, I think we may properly dismiss the appeal.

Judgment,  
OSLER,  
J.A.

MACLENNAN, J.A., concurred with BURTON, J.A.

*The Court being divided in opinion on  
the plaintiff's right to recover, the ap-  
peal was dismissed with costs.*

# DUGGAN V. THE LONDON AND CANADIAN LOAN AND AGENCY COMPANY ET AL.

*Shares—Pledge—Transfers “in trust”—Repledge by first pledgee—  
Redemption.*

The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company “in trust.” The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of “margins” certain other shares in the same company, the transfer being in the same form “in trust.” Subsequently the loan company were paid off by the brokers at the plaintiff's request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier “in trust,” and from time to time changed the loan to other banks and financial institutions each transfer being made from and to the managers thereof “in trust.” An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being transferred by the then holders to the defendants.

*Held*, reversing the judgment of STREET, J., 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words “in trust” in the transfers meant that the various transferees were holding the shares “in trust” for their respective institutions.

THIS was an appeal from the judgment of STREET, J., reported 19 O. R. 272.

Statement.

In October, 1881, the plaintiff, being the owner of 160 shares of the stock of the Toronto House Building Association, procured a loan of \$1,500 from the North British

**Statement.** Canadian Investment Company, and as security for the loan, transferred 80 of these shares to the defendants W. B. Scarth and Robert Cochran, who were managers of the company. The transfer was expressed upon its face to be "in trust." Scarth and Cochran, in addition to managing the company, carried on business as stock brokers, and the plaintiff through them engaged in a large number of stock speculations, and in February, 1882, transferred to them the remaining 80 shares to cover margins. This transfer was made to "Messrs. Scarth & Cochran of Toronto in trust."

In February, 1882, Scarth and Cochran transferred 80 shares to the cashier of the Standard Bank to secure advances made by that bank to them, the transfer being expressed to be to "John L. Brodie, in trust, cashier;" and in July, 1882, they transferred the remaining 80 shares to him for the same purpose, the transfer being to "John L. Brodie, cashier, in trust."

In 1883, they obtained a new loan from the Merchants' Bank, and at their request the 160 shares were transferred by the cashier of the Standard Bank to the manager of the Merchants' Bank, the transfer being to "William Cook, manager, in trust." Shortly after this Scarth and Cochran, at the plaintiff's request, paid to the North British and Canadian Investment Company the amount of the plaintiff's loan, but the stock was not reassigned to the plaintiff, but was treated as part of the security given by the plaintiff to them.

About this time the name of the company in which the shares were held, was changed from the "Toronto House Building Association" to "The Land Security Company."

In April, 1883, Scarth and Cochran's loan from the Merchants' Bank was paid off, and 45 shares were transferred to the "Home Savings and Loan Company in trust," and the remaining 115 shares to the cashier of the Federal Bank—"H. S. Strathy, cashier, in trust," each of the transfers being executed by Cochran as attorney for the manager of the Merchants' Bank, and each being made as security for a loan to Scarth and Cochran.



In January, 1885, the retiring cashier of the Federal Bank transferred to the new manager of the Federal Bank the 115 shares theretofore held by him, the transfer being made by "H. S. Strathy, cashier, in trust," to "J. O. Buchanan, manager, in trust." In 1886, an allotment of new shares was made by the Land Security Company among their then shareholders, and, at the request of the plaintiff, Cochran arranged with the holders of the shares to take up the allotment and pay the calls made upon them, and in pursuance of this arrangement the Home Savings and Loan Company accepted an allotment of 67 new shares, and the manager of the Federal Bank accepted an allotment of 172 new shares. Afterwards the Home Savings and Loan Company transferred the old and new shares then held by them to the Federal Bank, their claim being paid with money obtained from the bank, the transfer being to "J. O. Buchanan, manager, in trust." In February, 1887, a further allotment of new shares was made by the Land Security Company and "J. O. Buchanan, manager, in trust," received and accepted an allotment of 399 new shares, the calls upon the new stock in each case being added by the holders to the debt of Cochran for which the shares were pledged. In 1887, Cochran obtained an advance of \$14,300 from the defendants, the London and Canadian Loan and Agency Company, and as attorney of the manager of the Federal Bank, transferred to the manager of the Loan Company all the shares in question, the transfer being made to "James Turnbull, in trust." Shortly before the commencement of the action, the plaintiff tendered to the defendants, the Loan Company, \$7,500, alleged by him to be a sum sufficient to cover all that Cochran could claim from him, and demanded that the stock should be retransferred to him. The Loan Company, however, refused to recognize him in the matter, and claimed to hold the stock for the amount advanced by them to Cochran, and they subsequently sold the stock to Messrs. Osler & Hammond, realizing in all \$17,381.83. The plaintiff was aware from the beginning

**Statement.** of the transactions that Scarth and Cochran were raising money upon his stock, but he did not know until shortly before his tender to the Loan Company, that it was pledged for an amount in excess of what he owed the brokers. Scarth and Cochran had dissolved partnership in November, 1884; and after that time the business was continued by the defendant Cochran alone. At the time of the dissolution, the plaintiff owed the firm about \$4,100, and his stock was pledged for a considerably larger sum.

The plaintiff brought the action against the Loan Company and Turnbull their manager, and Scarth and Cochran, claiming an account from the defendants of the full value of the shares and payment of the amount thereof, and asking a declaration that the company could hold the shares only for the amount owing by the plaintiff to Scarth and Cochran.

The action was tried at Toronto, on the 4th and 8th of March, 1890, before STREET, J., who subsequently gave judgment in favour of the plaintiff, holding that Scarth and Cochran were trustees for the plaintiff of the shares in question, and that it was their duty to restore them to the plaintiff upon payment of their claim; that the Loan Company had notice of this trust, and therefore, were liable to pay to the plaintiff the value of the old shares less the balance due by him to Scarth and Cochran, at the time of the dissolution of the firm, and the value of the new shares less the balance due by him to Cochran upon the dealings subsequent to the dissolution of the firm.

The defendants, the Loan Company, appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 19th and 20th of January, 1891.

*E. Blake, Q. C., and O. A. Howland*, for the appellants. The Loan Company are in the same position as if the stock

were still held by the Federal Bank, and the learned Argument.  
Judge was not right in holding that they must be treated as if this were a direct transaction between Cochran and themselves; but even if they are so treated, they are entitled to hold the stock for the full amount of the advance which they made to Cochran. Under the Act of Incorporation of the Land Security Company, the stock is made personalty and assignable: 36 Vic. ch. 128, sec. 6. (O). The shares are not numbered and there is therefore no mode of tracing them. Under the English Joint Stock Companies' Act, the shares ought to be numbered, but even there it has been held that the transferee of shares who has obtained the legal title to them, takes them freed from any equities, of which he has not notice, existing between his transferor and any other person: *Briggs v. Massey*, 42 L. T. N. S. 49. The forms of transfer, "in trust," do not mean more than that, for convenience sake, an officer of the bank or other institution that advances the moneys, is selected as holder of the shares and receives the transfer as trustee for the institution advancing the money. Even in the case of the second transfer to Scarth and Cochran, where they were not acting as trustees for any bank or other institution, the use of the term "in trust," is explained by them to mean,—and it is a reasonable explanation—that they were to be able to deal with the stock in such a way as to raise money on it and to save themselves harmless for any sums which they might be called upon to advance for the plaintiff in the transactions.

We contend that the learned Judge was also wrong in holding that there had been sufficient shown to identify the shares owned by the plaintiff with those dealt with by the various persons who lent money to Scarth and Cochran and Cochran. On the contrary, the shares were not capable of being identified and definitely traced, and the plaintiff cannot now assert against the appellants his title to the shares which the appellants have disposed of.

The authorities cited by the learned Judge do not justify his conclusion that the plaintiff is entitled to assert

**Argument.** against the last transferee his ownership to the shares. All the authorities referred to on this point will be found to be cases in which there have been no higher rights than those of the alleged trustee involved. There was nothing in this case sufficient to put the defendants upon any enquiry as to title. The company were dealing with Cochran and he had authority from the Federal Bank, the registered holders of the shares, to transfer to them. At most Cochran was a mortgagor and *cestui qui trust*. *Bank of Montreal v. Sweeten*, 12 App. Cas. 617, relied on by the learned Judge, does not apply. There the trust in question was one between the owner and his immediate transferee, of which the bank had notice, and although the language of the judgment is very wide, still it turns on the special facts of the case. It is shown that if the bank had made the slightest enquiry, they would have found that it was clearly a dealing with property that was confessedly held in trust for another person. On the face of it it was a contradiction of the character in which the property was being held to pledge it for the individual's own debt, and those who chose to take without enquiry, took all the risks. This distinction runs all through the cases. See *Duncan v. Jaudon*, 15 Wall. 165; *Gaston v. American Exchange Bank*, 29 N. J. Eq. 98; *Shaw v. Spencer*, 100 Mass. 382; *Albert v. Baltimore*, 2 Md. 159; *Bayard v. Farmers' and Mechanics' Bank*, 52 Pa. St. 232. Then the course of conduct and dealing, the acquiescence of the plaintiff, leaving this stock in this situation exposed to all these vicissitudes, disables him from now coming forward and taking it from the appellants. He knew that he was running the risk of its being dealt with, and he was relying on Scarth and Cochran and cannot now reclaim it from the innocent transferees.

*McCarthy*, Q. C., and *J. K. Kerr*, Q. C., for the respondent. The shares in question are not negotiable securities. True it is that they are assignable by virtue of the Act of Incorporation, but the law applicable to negotiable securi-



ties does not apply to them. A negotiable security is one Argument. which may be transferred from hand to hand, upon which the holder or transferee, without reference at all to the transferor, may maintain an action, but here all that could be done was that the holder of stock might transfer and dispose of it in certain ways provided by charter and statute. There are some loose expressions in some cases as to a defence of purchase for value without notice being applicable to transactions in connection with the sale of chattels, but in strictness that doctrine does not apply to the sale of chattels. Where it has been held that a good title has been obtained to chattels, the transferor not having a good title thereto, the decisions will be found to rest upon the doctrine of estoppel. Either the true owner must sell or he must be estopped from asserting his right. This is the principle upon which *Cook v. Eshelby*, 12 App. Cas. 271, was decided, and there is no other principle upon which an owner can be deprived of chattel property. This case is the same as that of *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, and *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789. When the North British Company were paid off, the shares were held by the brokers as security for one loan, and the subsequent transfers with the words "in trust" added, were notice to the lenders that the persons transferring the shares were not the absolute owners, and inquiry should then have been made as to the true state of the title: *Bank of Montreal v. Sweeny*, 12 App. Cas. 617; *Lindley on Companies*, p. 175; *Williams v. Colonial Bank*, 38 Ch. D. 388; 15 App. Cas. 267.

*E. Blake*, Q.C., in reply.

May 12th, 1891. HAGARTY, C. J. O. :—

I have given much anxious consideration to this case, and finally have arrived at the conclusion that the plaintiff has failed to make these defendants liable.

My learned brother MacLennan has fully stated the facts in evidence, and I need not restate them.

Judgment.

HAGARTY,  
C.J.O.

I think the use of the words "in trust," has been explained as applicable merely to shew that the bank or company officer, assignor, or assignee, is not intended to be the beneficial owner, but merely on behalf of his company.

The defendants take over, as it were, the loan made by the Federal Bank to Cochran.

If the defendants had enquired they would have found these shares apparently duly assigned to Buchanan in trust for the Federal Bank, by the Home Savings and Loan Company, through Cochran as attorney, and a formal transfer thereof from Buchanan to them, through Turnbull their manager; also, through Cochran. I hardly think that the law required them to trace up the title any further.

The formal transfer is as of shares belonging to the Federal Bank, through their manager.

Now the utmost knowledge that we can impute to them on the evidence is, that they knew that Cochran was the party who had these shares pledged to the Federal Bank for advances; that he was a broker, and that the account was being transferred from the Federal Bank to them. He signs the deed of hypothecation authorizing the defendants to sell without notice, and with a clause that if he should have any future loans from them, the present shares should be a security therefor, etc.

The late case of *Baker v. Nottingham Banking Co.*, 7 Times L. R. 235, before Mr. Justice Day, points out the difference between such cases as *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789, and that before him. He says the bank knew that Braithwaite, who deposited the shares with them, was a broker; that if they did he could see nothing in the case which should make them infer from that fact that he was not the true owner of the bonds.

Both in *Simmons' Case* and in *Earl of Sheffield's Case*, the facts in evidence warranted the conclusion which the Court drew, that the defendants knew that the broker was pledging other persons' property for his own purposes.

The broker was known to be in the habit of depositing at the same time the securities of different persons to obtain advances, with a right to replace them from time to time with others, etc., etc. From all the facts it was held that, (in the language of one Judge) they had "notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that enquiry should be made into such title."

Judgment.

HAGARTY,  
C.J.O.

In both these cases the dealing was direct between the broker of the original owner and the defendants advancing the money to him.

Here the shares in question passed through many hands, from one lender or pledgee, till they came to the defendants.

Here the plaintiff's first original transfer of the stock was made to Scarth and Cochran in trust. The transfer is headed by the name of the company; these transferees were managers of the company, and perhaps had enquiry been made, the same explanation as to the meaning of these words would have been given as in the later transfers. The second transfer was not to them as such managers but apparently for margins in dealings between the plaintiff and the brokers in stock speculations.

On the whole, I cannot feel warranted in holding that the defendants did not receive the transfer and advance their money in good faith; or that they had such information from the nature of the dealing as made it reasonable that enquiry should be made into the origin of the title and of all intermediate transfers.

The case seems to me to fall within the well-known principle that, when one of two innocent persons must suffer by the misconduct of a third, the scale must naturally incline against that person who has placed it in the power of the wrong-doer to commit the wrong. There is much in the case to induce the belief that the plaintiff must have known that he had placed it in the broker's power possibly to use for his own purposes the property intrusted to him.

Judgment. If we decide in the plaintiff's favour, I think we shall  
HAGARTY, extend the general principle governing such cases much  
C.J.O. beyond any decisions of which we are aware.

I think this appeal must be allowed.

BURTON, J. A. :—

The advocates of the Torrens system are in the habit of contrasting the expensive and cumbrous system of dealing with land and its concomitants of deduction of title, abstracts, objections and requisitions, with the facility, simplicity, and absence of expense in the sale and transfer of stocks in the public funds and shares in joint stock and other companies; but if the present judgment is to stand, it seems to me that there will be more difficulty and uncertainty in the title to shares than there is under the present system with regard to land, more especially in a case like that before us, in which the shares are not numbered, and in which, therefore, it would be next to impossible to trace the title to the shares in question.

I should have thought it unnecessary to add any thing to what has been said by the other members of the Court, but that we are overruling the learned Judge, and that my previous views upon the subject of what was sufficient notice to a purchaser to put him upon enquiry, had received something like a shock from the quotations of the language used by some of the Judges in England, in such cases as *Earl of Sheffield v. The London Joint Stock Bank*, 13 App. Cas., 333, and *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789, which, having been used in reference to negotiable securities—in the sense in which bills of exchange and promissory notes are negotiable, so that delivery by a person who has no title, confers, nevertheless, a title on a *bonâ fide* holder for value without notice—would be equally applicable to a case of this kind, where the legal title passes by transfer, unless the Factors' Act applies.

Before referring to the distinction which I think exists



between those cases and the one we are considering, I may say that I quite agree with the learned Judge below, that the general rule of law in respect to the transfer of ordinary goods and chattels, applies to shares in a public company, subject to this qualification which applies to both descriptions of property—viz., that if the equitable title is in one person, and the legal title is in another, the purchaser from the legal owner *bonâ fide* and without notice of the equitable title, acquires a good title; and here, I think, is the distinction between this case and *Williams v. The Colonial Bank*, 38 Ch. D. 388, relied on by the learned Judge—viz., that the evidence in that case showed that, in the state in which the share certificates were at the time they were deposited with the bankers, they were not in order—that is, that business men would not take them without enquiry.

Judgment.  
BURTON,  
J. A.

I come then to consider the cases I have referred to:—One of them, the *Earl of Sheffield's Case*, is a decision of the House of Lords, but I think it is no authority for holding that the defendants in this case were put upon enquiry.

Mozley, in his evidence in that case, in answer to a hypothetical case suggested by the Judge—viz., if £14,000 worth of securities were deposited by the gentleman who borrowed that £14,000 replied: "Upon his repayment of that £14,000, I was bound to return him any securities which he had deposited," and added "I lent money upon them, and up to the extent I lent upon them I could use them again."

All the Judges, both in the Court of Appeal and in the House of Lords, were of opinion that, as a matter of fact, the banks knew the nature of Mozley's business; and Lord Halsbury says: "If this was the course of business which the banks knew, how can it be said that it would not be contrary to good faith for the banks to retain the securities, not only for the amounts borrowed upon them by the owners, but for what Mozley owed to them?"

It is the subsequent passage in the Lord Chancellor's judgment which startled me: "But if they had reason to

Judgment.

BURTON,  
J.A.

think that the securities might be Mozley's own, or might belong to somebody else, I think they were bound to enquire." This is, no doubt, somewhat sweeping, but must, I think, be qualified by what he had said as to the knowledge of the bank.

Lord Watson remarks that the character of the transactions was of itself sufficient to notify to them that Mozley's interest was limited; and Lord Bramwell, holding with the other lords that the banks had notice, expressly says that he does not think that "notice that possibly the pledgor had no power to pledge as he did," would be sufficient, "because" he added, "that is always possible."

In the subsequent case to which I have referred, the Court of Appeal based their judgment upon the fact that the bank did not believe that the broker had been authorized by the real owner to deposit the bonds en bloc with other securities which belonged to other persons, and to raise a lump sum upon the whole, and if this was the true view of the transaction, the bank never became *bonâ fide* holders for value without notice, since they never believed that the broker was the true owner—and never, indeed, believed that any authority had been given by the true owner.

The Court having come to that conclusion as to the bank's knowledge, it followed that the real owner was entitled to recover. But is there anything in this case that can warrant us in coming to the conclusion that the defendants or their manager Turnbull had any reason to believe that Cochran was not the true owner? It may be true that he was under an erroneous impression as to the law; and that even if he had suspected that the shares were not the property of Cochran but were entrusted to him with only a limited authority to pledge them, that he would have acted in the same way, in which case the defendants might have suffered as the banks did in the cases referred to; but there is no finding by the learned Judge that Turnbull had any notice, and there is no sufficient evidence, in my

opinion, to have warranted such a finding; on the contrary, the learned Judge places his decision upon the fact that he had notice that Buchanan held them in trust, and that put him upon enquiry.

Judgment.  
BURTON,  
J.A.

I should have thought it apparent here upon face of the instrument, that the only effect of the words used here was to shew that Buchanan held the shares, not for his own interest, but as trustee for the bank of which he was manager; but the evidence showed that to be the case. What further enquiry therefore was then imposed upon a purchaser? Cochran appeared to be absolute owner, and there was nothing to show that he held in trust for any one.

The case is wholly different from *Bank of Montreal v. Sweeny*, 12 App. Cas. 617, where a person indebted to the bank, was transferring, in security for his own debt, shares which the bank knew were not his own, but were held in trust for some one.

I agree, therefore, in thinking that if the plaintiff has any remedy, it must be sought in another direction; and that no case has been made out for impeaching the transfer to the defendants, and the judgment below should, as regards the defendants, the London and Canadian Loan and Agency Company and Turnbull, be reversed, and the action as to them, dismissed.

In this view of the case, it becomes unnecessary to consider the effect of our Factors' Act.

MACLENNAN, J. A. :—

This case is of great general importance, and was very elaborately argued on both sides.

By the Act incorporating the company, the shares of whose capital stock are in question, 36 Vic. ch. 128, sec. 6 (O.), it is declared that the shares are personal estate, and are assignable, and that no transfer of any share shall be valid, until entered in the books of the company, according to such forms as the directors may from time to time appoint. There are other

Judgment. restrictions upon the right and power of transfer, but they  
MACLENNAN, are immaterial to the present case, and need not be noticed.  
J.A.

All the several transfers which were so much discussed were entered in the company's books, and no question was made as to their being in due accordance with the forms prescribed by the directors, and there can therefore be no doubt that each transfer was effectual to pass the legal title and property in the shares to the transferee. It is also clear and beyond dispute that in each case there was a valuable consideration for the transfer. The defendants the London and Canadian Loan Company therefore are in this position. They have the legal title or property in the shares in question, and they have paid a valuable consideration for them. They do not dispute that they hold them as a security for the money which they advanced when they obtained the transfer, but they contend that, subject to the admitted right of redemption stipulated for when they received the shares, their title is unimpeachable.

The situation of persons who have acquired the legal title or property in goods for valuable consideration is well understood.

In *Dawson v. Prince*, 2 De G. & J. at p. 49, Lord Justice Turner said: "Both upon principle and upon authority I take it to be perfectly settled, that as against a purchaser for valuable consideration without notice, having a legal title, this Court will give no relief." I have quoted this case because it was, like the present, a suit respecting personal estate, to shew that the doctrine is as applicable to personal estate as it is to land.

In Blackburn on Sales, 2nd ed., pp. 164-5, cases are cited with approval, shewing that where a contract has been induced by fraud, if the intention was to pass the property, the fraudulent purchaser may make a good title to an innocent purchaser for value, and I do not think Cotton, L. J., intended to question this doctrine in his remarks in *Williams v. Colonial Bank*, 38 Ch. D. at p. 399, referred to in the Court below.

In *Cundy v. Lindsay*, 3 App. Cas. 459, decided in 1878,



Lord Cairns used the following language: (p. 464) "With regard to the title to personal property, the settled and well known rules of law may, I take it, be thus expressed. \* \* \* If it turns out that the chattel has come into the hands of the person who professed to sell it, by a *de facto* contract, that is to say, a contract which has purported to pass the property to him from the owner of the property, here the purchaser will obtain a good title, even although afterwards it should appear that there were circumstances connected with that contract, which would enable the original owner of the goods to reduce it and to set it aside, because these circumstances so enabling the original owner of the goods, or of the chattel, to reduce the contract, and to set it aside, will not be allowed to interfere with a title for valuable consideration obtained by some third party during the interval while the contract remained unreduced." And in *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. at p. 345, Lord Bramwell, speaking of what took place in that case says: "What he (that is the owner of the shares) did, however, as to his shares, was to execute a transfer of them, which was duly registered; the legal estate in them became vested in some of the respondents, who, being purchasers for value, acquired a title which could not be set aside, unless they had notice of the infirmity of the title of those from whom they claimed," and although the principle is not in terms stated by the other lords it is evidently recognized throughout all the judgments as having been correctly stated by Lord Bramwell. The general doctrine is also stated by Lord Selborne in *Société Générale de Paris v. Walker*, 11 App. Cas. at p. 27, in a case like this, relating to shares, in this manner: "The appellants in this case cannot succeed unless they shew either that they have acquired a legal title to the shares in question, unaffected, as between them and the respondents, by any equity, or that (both titles being equitable) their equity, though posterior in time, ought to be preferred to that of the respondents." See also Lindley on Companies, p. 476.

Judgment.  
MACLENNAN  
J.A.

Judgment.

MACLENNAN  
J.A.

I should not have thought it necessary to cite authorities on this point, because I think the law has long been settled, but that the learned Judge in the Court below did not, as I think with great respect, attach sufficient importance to the fact that the plaintiff had parted with the legal title in his shares, and also that the learned counsel for the plaintiff contended that the plaintiff's original transfer having been expressed to be in trust, and having been in fact made for purposes of security to the transferees Scarth and Cochran, every subsequent transferee, necessarily, and independently of notice of the trust, took the shares upon the same trust and subject to the same qualification. The learned counsel referred to *Cooke v. Eshelby*, 12 App. Cas. 271, as supporting his contention, and as shewing that the general principle governing such cases was estoppel, and that the present plaintiff not having done anything to impair his rights as between him and Scarth, Cochran & Co., could not be deprived of them by an assignee from them. That case, however, merely decides that a purchaser from an undisclosed principal could not set off against the price, a demand against the vendors' agent personally, unless he was induced by the conduct of the principal to believe and did believe that the agent was selling on his own account. The distinction between a case like that and the present is plain. The agent who is selling has not the property in the goods, and unless the purchaser is led to believe, and does believe, it is otherwise he can have no right of set off. Here the plaintiff transferred to Scarth and Cochran the legal title in the shares. They were made transferable by the statute, and a purchaser for value must be allowed to keep them as property which he has honestly bought and paid for, unless there is some equitable ground on which they can be taken away from him.

I think that is the situation of the defendants, the Loan Company; and unless they had notice of the plaintiff's equitable title, at or before the time they acquired title in the shares, that title cannot be taken away or reduced.

The real situation and rights of the parties on the 7th

September, 1887, when the defendants obtained their title were as follows :

Judgment.  
 MACLENNAN,  
 J.A.

The Federal Bank had the legal title to all the shares, the 160 old, fully paid up, and the 638 new, issued in 1886 and 1887, respectively paid up to \$5 per share only, the legal title being in fact vested in Mr. Buchanan as the bank's trustee. The bank held them as mortgagees merely. The exact sum which was due to the bank has not been stated any where I think, but I think it is to be inferred that it was the same amount as was afterwards advanced by the defendants, the London and Canadian Loan and Agency Company, \$13,450. The bank's borrower was Cochran, who had a right to redeem the shares on payment of what was due to them. But Cochran himself was in reality only a mortgagee, and the real owner of the shares was the plaintiff, who had a right to redeem Cochran on payment of a much less sum than was due to the bank—namely, about \$6,800.

In that state of things, the defendants obtained the legal title to the shares, and paid therefor, in the form of an advance by way of loan to Cochran, \$13,450, and the question is, whether they are *bonâ fide* purchasers without notice, so that they are entitled to hold the shares against the plaintiff for the full sum advanced. The onus of proving notice is on the plaintiff. There is no dispute about the position of Searth, Cochran & Co., the original transferees of the 160 shares. They received them and held them by way of security in connection with speculations in stocks, which they were carrying on for the plaintiff. For some time after they obtained them, the plaintiff's debt to them was very large, as much as \$40,000 : and while they also held the shares which were the subject of the speculations by way of security, I think it cannot be denied that the shares in question were also a security for the whole debt. The debt continued to be as much as \$18,000 until October, 1883, and in November of that year it was reduced to about \$4,000 or \$5,000, and save for the sums paid to take up the new shares, has never at

Judgment.

MACLENNAN,  
J.A.

any time since exceeded the last mentioned sum. In February and July, 1882, while the plaintiff's debt was very large, Scarth & Co., assigned the shares to the Standard Bank, as security for money advanced. After that time the legal title in the shares never came back to Scarth & Co., or to Cochran, but passed from one bank manager to another, at the request, and in most cases by the act, of Cochran as attorney for the transferor; the new transferee advancing the sum necessary to pay off the debt due to the transferor. In one case the transfer was not to a bank, but to the Home Savings and Loan Company, which held 45 shares from 11th of April, 1883, to the 14th of December, 1886. In all these cases the transferees held the shares as security for advances made either to or at the request of Cochran. But it does not appear what the sums were which were advanced from time to time, except this that he tells us that on April 11th, 1883, he borrowed from the Federal Bank \$13,450, on 235 Land Security, and 300 of Scottish Ontario shares; that payments were made from time to time, and some shares were released, and that at the end of 1885, the debt was about \$8,300, and the stocks held by the bank were 115 Land Security, old; 117 new; 175 Scottish Ontario, and 70 shares of Ontario and Qu'Appelle. There is some confusion as to what took place on the 11th of April, 1883. He says he borrowed the \$13,450 on that day from the Federal Bank on 235 shares of Land Security, and 300 of Scottish Ontario. There is no doubt 235 shares of Land Security were transferred to the Federal Bank on that day, from Mr. Cook of the Merchants' Bank. But Mr. Cook on the same day assigned 45 shares to the Home District Savings Company, which are said to be part of the plaintiff's shares. At all events, in 1886, these 45 shares, with the new allotment in respect of them, were transferred to the Federal Bank, and the latter became the holders of all, and whatever may have become of the other 120 old shares, which Cochran says were part of the security for the advance he received on the 11th of April, 1883, it was the



fact that on the 7th of February, 1887, the Federal Bank had 160 old shares, and 638 new, ready to be returned to Cochran on payment of the advances made to him, or at his request, on the security of the shares. The amount due to the bank was, as I have already mentioned, the balance of the advance made on the 11th of April, 1883, the sum paid by them to the Home District Savings Company in 1886, and the sum paid by themselves to the Land Security Company to take up the new shares.

Judgment.

MACLENNAN,  
J.A.

It is to be noted that the legal title in the new shares never was in the plaintiff, nor in Cochran; 67 of them had been allotted to the Home Savings and Loan Company, and the rest to the Federal Bank.

It was contended that Cochran had no right as between him and the plaintiff to borrow money on the shares. I was surprised at this contention for I never heard it doubted that a mortgagee could assign his mortgage or could make a sub-mortgage. It may be different where there is an agreement not to do so, or in the case of a mere pledge where the general property remains in the pledgor. I say nothing about that, but I entertain no doubt that a legal mortgagee of real or personal property may assign the debt and the security either absolutely or by way of sub-mortgage as freely as he may deal with any other kind of property. It is not alleged that there was any agreement that Scarth & Co. should not assign the shares; all that is alleged is that there was no arrangement or agreement entitling them to do so.

Then in April, 1883, when Cochran obtained his loan from the Federal Bank of \$13,450, Duggan owed him three times that sum. It is true that besides the shares in question Cochran held Hudson Bay shares and North-West Land Company shares to a large amount, also belonging to the plaintiff, and the whole mass was security for the debt. Now if Cochran had notified the Federal Bank on the 11th of April of the actual state of affairs between him and the plaintiff, was there anything to prevent the bank from making the loan? What impropriety could there be in

Judgment. their doing so? And if, besides, after the money had been  
MACLENNAN, borrowed, Cochran or the bank had informed the plaintiff  
J.A. of it, what possible ground of complaint could he have  
had? The result of the operation would be that the plaintiff would owe the bank so much upon the security of the shares in question, and he would owe Cochran so much upon the security of the other shares, instead of owing the whole debt to Cochran upon the security of the whole mass of shares.

Now that is just what was done; but the bank did not know of the plaintiff's interest, and the plaintiff possibly did not know that his shares had been sub-mortgaged. I think the want of knowledge or notice could make no difference, and I think that the bank having obtained the legal title to the shares, and also the equitable title to the extent of the advance made by them to Cochran, their title as mortgagees to the extent of the loan then made was good.

While it is not essential to the validity of an assignment of a mortgage that notice should be given to the mortgagor: *Jones v. Gibbons*, 9 Ves. at p. 410, it is a rule that payments by the mortgagor to the original mortgagee after the assignment, but without notice of it, are binding on the assignee: Coote's Law of Mortgage, 5th ed., p. 723; Fisher's Law of Mortgage, 4th ed., p. 846; *Williams v. Sorrell*, 4 Ves. 389; *In re Lord Southampton's Estate*, 16 Ch.D. 178; and if either by actual payment or by means of the proceeds of other securities in their hands, the whole of the plaintiff's debt to Scarth & Co. had been received by them, the bank's claim, in the absence of previous notice to the plaintiff of the assignment, would be wholly satisfied and gone, and they would have had to give up their shares to him. Now that is what actually took place except that the securities realized did not pay the whole debt. By realizing the other securities, Cochran reduced the total debt owing by the plaintiff to \$4,000 or \$5,000; but he did not pay a sufficient sum to the bank to make the mortgage account correct, as between the bank and the plaintiff. That gives rise to the

question whether after that the bank could hold their security as against the plaintiff for more than the reduced amount. That question depends on notice to the bank of Duggan's equity of redemption.

Judgment.  
MACLENNAN,  
J.A.

It is not pretended that any of the banks or their officers had actual notice of Duggan's interest, or actual notice of the words of trust contained in the transfers signed by him ; and I think there is clearly no sufficient constructive notice to Brodie or Cook, or their respective banks. There is more difficulty in the case of Buchanan on the 11th of April, 1883, because that was a loan on a block of securities of two different kinds. But when it is remembered that the 235 Land Security shares transferred on that day, came not from Cochran direct but from Cook, of the Merchants' Bank, I find it difficult to say how it can be held that Buchanan had any such knowledge as put him upon further enquiry. In the view I take of the case, it is not necessary to decide that question. Whether they had notice or not, in my judgment the mortgage to the Federal Bank was, and continued to be, unquestionable, so far as having the legal title to the shares, and to the extent of the unpaid balance due by the plaintiff to Cochran, plus what was advanced to Cook upon the new shares. The legal title to the latter had never been in the plaintiff or in Cochran, but the bank knew they were an accretion, and they were therefore in equity in the same situation as the original shares.

The result, in my opinion, therefore, is that on the 7th of September, 1887, the bank had a good title as against the plaintiff to all the shares as security to the amount of the balance of the plaintiff's debt to Cochran, plus what was paid to the company to take up the new shares ; and this even if we suppose that when they made the loan originally on the 11th of April, 1883, they had full notice that the plaintiff was the real owner of the shares, and that Cochran held them, as he did, merely as a security, and subject to that in trust for the plaintiff.

It is not necessary, therefore, up to this point, to con-

Judgment. sider the effect of the words "in trust" found in the several transfers ; but I am clearly of opinion that these words in the first transfer meant only that Scarth and Cochran were trustees for the North British Company, and that in the transfers to the respective bank managers, they meant no more than in trust for the respective banks.

MACLENNAN,  
J.A.

In the case of the second transfer to Scarth & Co., and in that to the Home Savings and Loan Company, they could only mean that the transferees were not the beneficial owners, at all events, not absolutely, but that other persons were interested as well. I do not think that the *Bank of Montreal v. Sweeny*, 12 App. Cas. 617, obliges us to hold that the words "in trust" in a transfer, mean anything more than the trust the parties intended by the use of the words. The Judicial Committee in that case held that those words in the transfer to Rose, expressed what was the actual fact, that the shares did not belong to him but to the lady ; and they also assented to the similar proposition, that the same words in the transfer to Buchanan meant that the shares were not his but those of the bank. An instrument declares that there is a trust, but does not explain what it is. How are you to find out the meaning in order to give effect to the instrument ? The only way is to resort to evidence, and find out what it was the parties intended. Here it is proved that the bank officers by and to whom the transfers were made "in trust," used those words as meaning in trust for the respective institutions whose servants they were, and not for themselves, and not as meaning anything else whatever ; and it is impossible in my judgment, to contend with any show of reason that any other or further meaning can be put upon them by the Court, or that they can be held as meaning a trust for the plaintiff or any one else who might have a secret interest in the shares.

I now come to the transaction of the 7th of September, 1887, whereby the defendants became the mortgagees of the shares.

As early as November, 1883, Cochran had, by means of



the other securities of the plaintiff in his hands, received money enough to pay what was due to him, apart from what was due to the bank, and a considerable sum more. It was his duty to have paid the whole of that excess to the bank, in reduction of the loan he had obtained from them; or to have paid or accounted for it to the plaintiff, but he did not do so, and the result was, that at the last mentioned date, the bank held the shares for several thousand dollars more than was justly due from the plaintiff to him.

Judgment.  


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 MACLENNAN,  
 J.A.

In that state of things, Cochran went to the defendant company and proposed to borrow \$14,300 on the security of the shares in question. The proposal was agreed to, and was carried out in the following manner: a deed of hypothecation was executed by Cochran, stating the terms of the loan and the particulars of the security, including a covenant for payment and a power of sale on default, with other stipulations which need not be mentioned. Mr. Turnbull, the agent of the company, and Cochran then attended at the office of the Land Security Company, and there in the books of that company, two transfers were signed and accepted; the first, a transfer of the 160 paid up shares; and the other, of the 638 shares partly paid up, both to Mr. Turnbull. Mr. Cochran produced a power of attorney to himself executed by Mr. Buchanan, authorizing him to make the transfers, and they were made by him in Buchanan's behalf, and Mr. Turnbull accepted them, adding to his name the words, "in trust;" these words being also appended to Mr. Turnbull's name in the body of the transfers. The shares were taken to Mr. Turnbull in trust for the defendants, the Loan Company; and he tells us that was the intention and meaning of the words "in trust," used in the instruments. The money agreed to be advanced, was paid at the same time.

The question now arises whether there is any ground on which this mortgage can be cut down by Duggan to the sum actually due from him to Cochran. The judg-

Judgment.  
MACLENNAN,  
J.A.

ment appealed from has so cut it down, and the question is whether it can be supported. Cochran is unable to pay the difference between what is justly due to the company, and the smaller sum which alone the plaintiff owes, and ought in justice to be called upon to pay. If there is any flaw in the company's title the plaintiff may fairly avail himself of it, and on the other hand the company cannot be deprived of their title or of any of the money they fairly and honestly advanced unless upon some clear ground of equity.

It was urged upon us with great force that this case is governed by the *Earl of Sheffield's Case* already mentioned, and the subsequent case of *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789, but I think there is a great difference between those cases and the present.

In those cases the transactions were between bankers and their customers. The customer in the one case was an extensive money dealer, lending and borrowing money on stocks and bonds and other securities of that kind, and in the other case he was a broker whose business was retaining the securities of clients for safe custody, and buying and selling securities and lending money on them. There was a course of dealing in each case between the banks and the customer, the nature of which was well known to the banks. That course of dealing was for the customer to get large advances from the banks by transferring his clients' securities in mass to cover the whole advance, there being at the same time an arrangement that the customer should be permitted to withdraw from time to time such securities as he might require upon part payment or by substituting other securities. The Court held that under such circumstances the banks were not entitled to the position of purchasers for value without notice. It is essential to this defence that the party believe when he buys that the vendor is the owner and can make a good title. It must be an honest *bonâ fide* belief. Knowing what they did the banks could not honestly believe that the securities were those of their customer. As put by Lord

Halsbury (p. 341): "They had reason to think that the securities might be Mozley's own or might belong to somebody else." They did not actually know they were not his; it was possible that they really were; but they had reason under the circumstances to think they might not be, and therefore they could not honestly believe they were. They knew the probabilities were very much against their being his own. As pointed out by Lord Bramwell, it is always possible that a vendor may not really be the owner, that a pledgor may not really have power to pledge. That possibility is immaterial, unless there is some reason to think that the fact is so, if the purchaser without fraud or culpable negligence really believes that he is the owner or has the power to sell or pledge.

Judgment.  
 MACLENNAN,  
 J.A.

The notice which affects a purchaser has often been discussed. The books are full of such cases. Lord Bramwell, in speaking of notice, says he does not think the expression "notice of the infirmity of title," on the part of the vendor, precise or accurate; and that "notice that possibly the pledgor has no power to pledge as he did," will not do, because that is always possible; and he adds that the expression should be something like this, "notice of the infirmity of the pledgor's title, or of such facts and matters as made it reasonable that enquiry should be made into such title." The language in which he thus defines the notice, which he deems sufficient, is evidently taken from the Imperial Conveyancing Act, 45 & 46 Vic. ch. 39, sec. 3, which is applicable to purchasers and mortgagees, and also to both real and personal estate. This enactment is considered to have narrowed the range of the equitable doctrine of constructive notice, which was supposed in some cases to have operated with much harshness. See Fisher's Law of Mortgage, 4th ed., at p. 517, and notes to *Le Neve v. Le Neve*, 2 W. & T. L. C. 6th ed., p. 45. As we have no such enactment, it is sufficient to say that this case is governed by the perhaps wider rules as to constructive notice established by decided cases. These will be found

Judgment. in Fisher's Law of Mortgage, 4th ed., p. 516, and in the  
MACLENNAN, notes to *Basset v. Nosworthy*, 2 W. T. & L. C. 6th ed., p. 1,  
J.A. and *Le Neve v. Le Neve*, 2 W. & T. L. C. 6th ed., p. 27.

In the present case, Cochran was a broker, and known to be such by Turnbull. There had been several previous transactions of loan similar to that in question between him and the company, and that was all. There is no proof of knowledge by the company or Turnbull of the nature or extent of Cochran's dealings, or that he lent or borrowed money on other people's securities; or that the shares in question were not his own. There was no stipulation in the contract of loan for withdrawing any part of the shares on payment of part or substitution of other securities; but it was a loan for a fixed time for one single sum upon the security of the total number of shares. I confess I am at a loss to see anything connected with this transaction, or the relations of the parties, or the circumstances attending it, as proved in evidence, which ought to have excited suspicion on the part of the company or Mr. Turnbull, or ought to have put them on enquiry.

Mr. Turnbull was very closely pressed in cross-examination by the learned counsel for the plaintiff, and reliance was placed on some answers he gave as to his belief in Cochran's ownership of the shares. He says he made no enquiry—he did not think it necessary, they believed the stock might belong to him, or it might belong to somebody else. We did not know, and of course, in the absence of anything to the contrary, we assumed it belonged to him. I think these answers would be open to observation if it was proved that the company or Mr. Turnbull had reason to believe, from a course of dealing with Cochran, or others, that the shares might probably not be his own, or that he had no power to deal with them, or that his power was limited or qualified; but in the absence of any proof of that kind, the answers are just such as might be expected upon a long and sharp cross-examination, and with questions put in a great many



different forms. I think Turnbull probably hardly thought at all about title, but took for granted that a respectable man like Cochran would not ask a loan on shares without having them; and the transfer having been completed in the company's books, he had no hesitation in paying over the money. And I think he is telling the simple truth when he says he believed that the shares belonged to Cochran, and did not know they belonged to customers of his. His saying that they might have belonged to some one else, is saying no more than, as pointed out by Lord Bramwell, is possible in every case; but I think that possibility did not interfere with his honest belief.

Judgment.  
MACLENNAN,  
J.A.

I think then that the cases of the *Earl of Sheffield v. London Joint Stock Bank*, 13 App. Cas. 333, and *Simmons v. London Joint Stock Bank*, 63 L. T. N. S. 789, do not govern the present case, and that it ought rather to be decided in the same way as *Baker v. Nottingham Banking Co.*, 7 Times L. R. 235, and for the same reason, so far as it depends on the nature of Cochran's business, and the course of dealing between him and the defendant company.

Then is there any other infirmity in the company's title? They dealt with Cochran, but they did not get the shares from him. The Federal Bank as we have seen held the shares by way of security. They were not absolute owners, and the transfer to the defendants was from the bank, that is from the bank's trustee Buchanan, who gave a power of attorney for the purpose to Cochran. Now if Turnbull had notice that the bank were mere mortgagees, it might be contended that Turnbull's title could not be any better than that of the bank. Apart from a power of sale, a mortgagee can not assign more than he has himself, to a person having notice. In the present case the bank was not selling, the defendants were not buying from the bank, but were dealing with Cochran who professed to be owner. If the defendants were aware that the bank were merely mortgagees, then they had notice of an equity of redemption outstanding in somebody. They could only get a

Judgment.  
MACLENNAN,  
J.A. mortgagee's interest from the bank; they must get the equity of redemption from some one else. In that case a nice question would arise whether the company could get from Cochran a better equity than he possessed himself. It is not necessary to decide how that would be. There is no evidence whatever of any notice to the loan company or to Turnbull that the bank were or had been mortgagees. Cochran had an undoubted right to call for the legal title, for there was a balance still due to him from the plaintiff, and if it had in fact been transferred to him before his transaction with the loan company no question could have been raised. As it was however he contracted with the company as owner, as a person having the power to make the mortgage which he professed to make, and when the moment came for transferring the title, he fulfilled his engagement, and by means of the power of attorney duly conveyed the shares to the company. The protection which the law affords to purchasers for value without notice is well illustrated by the case of *Heath v. Crealock*, L. R. 10 Ch. 22. In that case persons had bought and paid for property and had obtained a conveyance, and a delivery of the title deeds. It turned out that a gross fraud had been practised upon them by the concealment of a large mortgage in fee which had previously been made. It was held that although they did not get the legal title when they bought, they could not be compelled to give up the title deeds to the mortgagee, because they had obtained them for valuable consideration without notice.

Lord Cairns, in delivering judgment, said: (at p. 32) "It appears to me clear, both upon principle and upon all the authorities which were cited, that it is the practice of the Court of Equity to take nothing away from a purchaser for valuable consideration of that which he has bought and holds. But something would be taken away if the title deeds which he has received from one who at the time was the holder of them, and the apparent owner of the estate, were taken away." And Lord Justice James says: "With regard to purchasers, it appears to me there are two car-

dinal principles and rules of this Court which are involved both on the one side and on the other. The first I take to be this, which in my opinion is a rule without exception, that from a purchaser for value without notice this Court takes nothing which that purchaser has honestly acquired. If the purchaser has got possession of a piece of parchment, or of property, or of anything else which he thought he was getting honestly, this Court, in my opinion, has no right to interfere with him." Another important case is *Pilcher v. Rawlins*, L. R. 7 Ch. 259, where James, L. J., says that "in the case of a purchaser for valuable consideration, without notice, obtaining, upon the occasion of his purchase, and by means of his purchase deed, some legal estate, some legal right, some legal advantage, \* \* \* such a purchaser's plea of a purchase for valuable consideration without notice is an absolute, unqualified, unanswerable defence."

Judgment.  
 MACLENNAN,  
 J. A.

I think, therefore, the defendants having obtained on the occasion of advancing their money, the legal title to the shares without any notice of the plaintiff's claim, are entitled to succeed on this appeal.

I think with great respect to the learned Judge, that the defendants were not bound to make any enquiry of Cochran how he held the shares, or whether his interest was absolute or qualified. He professed to have the right and power to convey and mortgage the shares, and when the moment for doing so arrived, he did so.

It was urged that the defendants were bound to trace back the title to the shares through the various transfers. I cannot agree to that, I think it would be impossible to do so. I know nothing which imposes that obligation; all that the purchaser of shares has power to do, has any right to do, or, as I think, ever does in practice, is to find out from the company whether the seller has the shares in his name on the register. The clerk who has charge of the transfer book virtually affirms this by permitting the transfer to be made. One who had no shares, would not be permitted to transfer. If in this case Mr. Turn-

Judgment.

MACLENNAN,  
J. A.

bull had enquired he would have found that Mr. Buchanan as manager, stood in the company's share-ledger as the owner of the shares which he had authorized Cochran to transfer, and he had no occasion or right to make further enquiry. The case of *Pilcher v. Rawlins*, L. R. 7 Ch. 259, cited above shews that a purchaser of real estate is not affected by a trust of which he had no notice, even though it was on the face of a deed without which he could not assert his title in an ejectment. I think this is a much stronger case, and I think we ought to express our opinion distinctly that a purchaser of shares is not bound to examine the antecedent transfers at the peril of being affected by trusts which may be expressed therein or in any of them.

In the view I take of the case it is not necessary to express a positive opinion on the question of following the shares as trust shares, but having regard to the fact that every transfer from first to last was made by or at the request of the alleged trustee, and that from first to last, subject to their claims for advances, the transferees held them as shares of Cochran, I incline to think their identity was never lost to such an extent as to prevent them from being followed.

OSLER, J. A., gave no opinion.

*Appeal allowed with costs.*

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## REDMOND V. CANADIAN MUTUAL AID ASSOCIATION.

*Insurance—Life Insurance—Assessments—Forfeiture—Waiver.*

Where a mutual insurance company have without objection received payment of assessments after the proper date for their payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist, and there is no conduct on their part tending to mislead the insured.

Judgment of the Queen's Bench Division reversed.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division in an action on a certificate of insurance.

The action was tried before MACMAHON, J., and the facts were shortly as follows :

The certificate in question was issued on the 11th of November, 1881, by the defendants to one John Redmond, insuring his life for \$1,700. The third clause of the certificate was as follows: "If the assured shall at any time within thirty days after receiving due notice fail to pay or cause to be paid the assessments at the office of the Association, and in accordance with the rules and regulations of said Association, then and in every such case the Association shall not be liable for payment of any sum whatsoever, and this certificate shall cease and determine."

A pamphlet issued by the Association in 1886, informed the members that notices of assessments would be sent between the 1st and 10th of each of the months of January, March, May, July, September and November, and on the 10th of November, 1888, notice was sent to Redmond of an assessment of \$5, and was deposited in the post-office to his address as required by the certificate.

The rules of the Association provided that—"Any member failing to pay his or her assessment within the time limited in the notice issued to him or her as aforesaid shall forfeit his or her membership and all moneys paid to the Association. Members may be restored at any time within one year from the issuing of the notice by paying all back

Statement.

dues to the Association and producing satisfactory proof of good health." And also that "the medical director shall examine all applications and report upon their acceptance or rejection, and his decision shall be final."

The Association was in the habit after thirty days had elapsed from the date of the assessment without payment of sending a duplicate notice stating that the thirty days had expired, and that if the member desired to be reinstated he was to sign a certificate as to the state of his health appended to the notice, and to return it together with the amount due at once, and that otherwise it would be necessary for the member to submit to a new medical examination.

The Association sent such a notice to Redmond in December, 1888.

On the 4th of February, Redmond forwarded \$5 to the Association, the amount of the November assessment, and stated that the health certificate sent by the Association to him could not then be found, as the member of the family who had received it from the post-office was absent from home.

On the 7th of February, the Association wrote to Redmond acknowledging the receipt of the \$5, but stating that as the time for paying the assessment had elapsed they would require a medical examination to be made. They enclosed a blank application for reinstatement containing the form for medical examination. They desired Redmond to have the examination made by Dr. Coburn, and notified him that the \$5 would be held until they heard from him, as they could not reinstate him unless the Association had satisfactory evidence as to his then state of health. This notice was received by Redmond on the 10th of February, and on the 17th he signed and returned the health certificate. In the body of the document there was a request that the January assessment should be sent to him.

On the 21st of February the Association acknowledged the receipt of this, but stated that the application for re-

instatement must be filled up, and the questions answered, and the examination made by Dr. Coburn, and that then it would be given consideration. Statement.

An examination was then made by Dr. Coburn, whose report was in the main favourable, but he reported that Redmond had a "feeble constitution," and made some other unfavourable remarks.

On the 28th of February, the Association wrote to Redmond acknowledging the receipt of the application for reinstatement, and the medical examination, but declining to reinstate him, and they returned to him the amount of the November assessment sent them.

Redmond died on the 12th of April, after an illness of forty hours. Dr. Robertson, the Medical Director of the Association, was called as a witness at the trial, and stated that the reason he advised the Association not to reinstate Redmond was because of the report of Dr. Coburn.

From the evidence of the plaintiff and her daughter it appeared that the reason for the non-payment of the assessment at an earlier day was partly because the family was not in immediate possession of the money, and partly because there had not, on former occasions, been any objection on the part of the Association to the receipt of the assessments long after the time for payment had elapsed. The plaintiff said if she had thought the Association intended to insist on prompt payment, she could have raised the money. She also stated that on former occasions when the assessments were not paid in time the Association required the insured to sign the health certificate appended to the duplicate or second notice, but that he had never been required to undergo a medical examination until the occasion in question.

Questions were submitted to the jury, which, with their answers, were as follows:

1. Was the company in the habit of accepting from Redmond payment of assessments when overdue? A. Yes.
2. If you answer the first question in the affirmative did this course of dealing induce the deceased (Redmond) not

Statement.

to pay the assessments until long after the second notice was given? A. Yes, it did. On one occasion twenty-six, on one occasion thirty-six days, on one occasion thirty days, on one occasion forty days.

3. Did Redmond after the second notice requiring payment at once of the December (1888) assessment apply for reinstatement? A. Yes.

4. Did the company before agreeing to Redmond's reinstatement require under the by-laws that he should undergo a medical examination? A. Yes, on one occasion. No, on three occasions.

5. Did Redmond submit to such medical examination in order to procure his reinstatement by the company? A. Yes, when required.

6. Was it in consequence of the unfavourable condition of Redmond's health as reported by Dr. Coburn that the company refused to reinstate him? A. Yes.

7. Did the age of Redmond constitute one of the principal reasons for the refusal of the company to reinstate? A. No.

8. What amount do you find the plaintiff entitled to recover from the company? A. Full amount.

On these findings a motion for judgment was made, but the learned Judge, after reserving judgment, dismissed the action with costs. The Divisional Court, however, on the plaintiff's application, made an order for a new trial, on the ground that the facts had not been ascertained with sufficient fulness, and they suggested a number of questions to be put to the jury at the new trial.

The defendants then appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 29th and 30th of January, 1891.

*G. H. Watson*, Q. C., for the appellants.

*F. A. Anglin*, for the respondent.



May 12th, 1891. BURTON, J. A. :—

Judgment.

BURTON,  
J. A.

[The learned Judge stated the facts and continued :]

I think, with great respect, that the material before the Judge was amply sufficient to enable him to dispose of the case, and the question is was he warranted upon the answers of the jury to decide as he did.

Forfeitures no doubt are not favoured, and insurers may by their acts estop themselves from setting them up if they have occurred, but like every other matter such estoppel requires to be made out by proper legal evidence, and contracts would be but “a delusion and a snare,” if one of the parties to them could wilfully disregard his portion of it, and still hold the other party to it liable because on some previous occasion there had been a similar default which the other party to the contract had as a matter of grace good naturedly consented to waive.

In the ordinary case of life assurance policies there is usually a condition that the policy will be void if the premium should not be paid within thirty days, usually termed “days of grace,” after the premium becomes due, but with a right reserved to the insured within a further period of being again placed upon the risk on payment of a fine, and showing to the satisfaction of the directors that his life is still an insurable one. It is beyond question the practice of companies to dispense with a medical examination where they know the party and are satisfied by other means of the goodness of the life; but it is an act of grace; the insured could not insist on being again on the risk without complying with the condition, and if the fact that the companies have on previous occasions acted with liberality in such matters is to be tortured into an estoppel we shall hear a great deal more of lapsed policies than we do at present.

The well-known case of *Acey v. Fernie*, 7 M. & W. 151, is a good illustration of the distinction between cases of conduct on the part of the company conducing to mislead an insured, and a mistake of the insured himself. In

Judgment. that case the insured paid to an agent of the company  
BURTON, whose authority was only to receive premiums in due  
J.A. course, a premium after it was due, and the company  
under the impression that he had received the amount on  
the day it fell due, had debited the agent with it in their  
books; but the Court held that the policy having lapsed,  
the agent had no power to enter into and make a new  
policy of insurance on the terms of the old one, and the  
mere entry in the company's books in ignorance of the  
facts did not estop them although it would of course have  
been different if they had adopted and confirmed the act  
of the agent.

The sending of the second notice operated, I think, as  
an extension of the thirty-day period, so that if the member  
had strictly complied with its terms he might have claimed  
to be reinstated without a medical examination, but if he  
did not do so, the mere circumstance of the company  
having on previous occasions consented to accept payment  
after defaults of a longer or shorter duration, gave the  
member no right to insist on reinstatement; but it is not  
necessary to consider how that would have been had there  
been nothing more than the notice and the death of the  
member within a similar period to some of those of the  
previous defaults.

The notice itself was a distinct intimation that notwith-  
standing previous waiver they still reserved the right on  
each occasion of default to insist on a medical examination.

On this occasion they did insist upon it, and the deceased  
complied with it.

The deceased may have erroneously supposed as the  
insured did in *Acey v. Fernie*, 7 M. & W. 151, that Dr.  
Coburn was the party to pass finally upon his state of  
health; but his mistake could not affect the company; he  
knew or ought to have known as he was a member of the  
company that the medical director of the company was the  
party to be satisfied.

I should have thought the judgment of the learned Judge  
upon these findings clearly right and should myself have

been prepared to decide upon that part of the case on the argument, but for the citation of a number of American cases which I felt ought to be considered before deciding.

Judgment.

BURTON,  
J.A.

One of these, *Buckbee v. United States Ins. Co.*, 18 Barb. 541, was greatly relied on, but the decision in that case appears to me to be good law, and in no way to militate against the views I have been expressing. The premium there was due on the 10th of the month, but was not paid on the 16th; it may be that the company might have refused to receive it, but they accepted it without objection, and could not of course afterwards complain that it was not paid in time.

The case of *Thompson v. St. Louis Ins. Co.*, 52 Mo. 469, is not in my opinion good law upon the facts there in evidence. There was a memorandum there at the foot of the policy: "Agents of this company are not authorized to waive forfeitures. If a premium is received by the company after the day named in the policy for its payment it is considered by the company and the assured as an act of grace or courtesy, and forms no precedent in regard to future payments." How can any company safely receive overdue payments if in the face of such a stipulation they are to be responsible to the risk of its being treated as an estoppel as to future payments?

*Insurance Co. v. Eggleston*, 96 U. S. 572, would I think be regarded as perfectly good law with us; the company removed their agency through which the policy had been effected, and were in the habit of notifying the insured to whom the premium should be paid. When the premium in question fell due the insured had the money ready, but was not notified until after the day for payment had passed when he at once tendered it, but it was refused. It would of course be contrary to every principle of justice to allow the company to forfeit under such circumstances, but I do not see how it assists the plaintiff here.

Many of the cases proceed upon a principle which is undoubted: that if the conduct of the company in its dealings with the assured had been such as to induce a

Judgment.

BURTON,  
J.A.

belief on his part that so much of the contract as provides for a forfeiture if the premium be not paid at the day, would not be enforced if payment were made within a reasonable period thereafter, the company ought not in common justice to be permitted to allege such forfeiture against one who acted upon that belief, and subsequently made or tendered the payment, and that if the acts creating such belief were done by the agent, and were subsequently approved by the company, either expressly or by receiving and retaining the premiums with the full knowledge of the circumstances, the same consequences will follow.

I do not think that that as a proposition of law will be questioned any where, but I should like to quote in connection with it the language of Mr. Justice Field in delivering the judgment of the Supreme Court in the case of *Insurance Co. v. Wolff*, 95 U. S., at p. 333: "The doctrine of waiver, as asserted against insurance companies to avoid the strict enforcement of conditions contained in their policies, is only another name for the doctrine of estoppel. It can only be invoked where the conduct of the companies has been such as to induce action in reliance upon it, *and where it would operate as a fraud upon the assured if they were afterwards allowed to disavow their conduct and enforce the conditions.*"

In the case of *Stylow v. Wisconsin, etc., Ins. Co.*, 69 Wis. 224, the company after the assessment had fallen due, in respect of which they might have forfeited the policy, made fresh assessments, evidencing very clearly that it was not their intention to avail themselves of the forfeiture.

The case of *National Mutual Benefit Association v. Jones*, 84 Kent. 110, would also be recognized as good law with us. There the secretary of the company received an overdue assessment, and afterwards received other assessments recognizing the assured as a member of good standing: it was of course under such circumstances, quite out of the question to treat his policy as forfeited.

I do not see how any of these cases assist the plaintiff.



How can it be said that the conduct of the company induced the action of the deceased, and in reliance upon that he refrained from making his payment? Each notice was a repetition of the warning that he was liable not to be reinstated except upon the conditions mentioned.

Judgment.  
BURTON,  
J.A.

It appears that the assessment was not neglected by reason of the insured relying on the representations or conduct of the company, but because as the deceased states in his own letter he was unable to meet it; it had then been about two months overdue. In answer to that letter he was told he could not be reinstated without a medical examination. To this he assented and applied in effect for a new insurance which was declined.

The answer of the jury to the second question is I think wholly without evidence to support it, but is at all events immaterial; they do not pretend to say that in reference to the November assessment he was influenced by that consideration; and if they had so found it would be not only unsupported by evidence, but directly in the teeth of the evidence.

Upon the answers then to the 3rd, 4th, 5th, 6th and 7th questions the only judgment which could properly be given was given by the learned trial Judge.

Then as to the new trial I must confess that I can discover no grounds consistently with the principles on which new trials are granted for granting it in this case. There are no affidavits filed shewing surprise, or the discovery of new facts, and no misdirection was complained of. I do not see what could be gained by submitting the case to a new jury except the possibility of depriving the defendants of a judgment to which upon the evidence I think them fairly entitled. But if it had been doubtful whether a new trial should be granted I think the difficulty is much increased by the unusual course pursued by the Queen's Bench in suggesting a number of questions to be submitted to the jury, some of which, with deference, I consider very objectionable, both on account of their very suggestive frame, but also on the ground that some of them would in

Judgment.

BURTON,  
J.A.

effect be substituting the jury for the medical director, who by the terms of the contract was to be the sole judge of whether the deceased's health was such as to make him a fit subject for insurance. Such a stipulation is essentially different from one which requires proof of death to be made to the satisfaction of the directors; where it is apparent that what was meant by the parties to the contract was the reasonable satisfaction of the directors. Here the medical referee is made sole judge, and in the absence of fraud or collusion his decision is final and cannot be reviewed by a Court or jury.

I have spoken of the medical director as the party to be satisfied as to the state of health, because the question has been so treated throughout the case and by the Divisional Court in the questions suggested for the jury, but I have not overlooked the fact that the by-laws are rather loosely framed in this respect.

The only application referred to in the by-laws is the application for original insurance, and construed strictly—as perhaps in a case involving forfeiture it should be—the clause in reference to the medical director might be held to be confined to applications of that kind; but in the result it is not I think of importance, the proof had to be satisfactory to the directors, and in the absence of *mala fides* their conclusion is not impeachable.

I think that the appeal should succeed and that the judgment of my brother MacMahon should be restored.

The attention of the taxing officer should be drawn to the appeal book which seems to contain a great deal of unnecessary matter.

HAGARTY, C. J. O. :—

I agree in the judgment just delivered. Neither party suggested that there was any evidence bearing on the case which could be produced at any future trial.

I think the questions submitted to the jury were fully sufficient to elicit all the facts urged on either side.

As to the questions :—The first answered in the affirmative seems to me to be nothing more than the assertion of an undisputed fact.

Judgment.  
HAGARTY,  
C.J.O.

The second, also found for the plaintiff, seems to me to be wholly unsupported in evidence if it is sought to be used as a finding of anything done by the defendants as a legal bar to defendants' right to insist on the forfeiture by nonpayment at the appointed time. If it merely meant that Redmond omitted to pay, taking it for granted that as the company had previously accepted payments overdue, and trusting that they would accept it from him as before, then it proves what need not be disputed.

I can see no evidence whatever in the case to support the assertion that the company had in any way or by any conduct on their part as to previous payments waived or forfeited their right to insist on prompt payment at the prescribed time on any future occasion.

A creditor may over and over again have indulged his debtor by not pressing him for payment on the first day of default without losing his right to require a future payment at the exact time. A landlord or a mortgagee may often accept rent or an instalment from a tenant or mortgagor after the appointed day without losing his right to prompt payment for the future, or his right of re-entry for nonpayment at the appointed time.

Here the condition of continued insurance is the payment at appointed times, otherwise the contract is at an end. The option of accepting an overdue payment, and so continuing the insurance, or of insisting on prompt payment on any future occasion, must be with the defendants.

As to the reinstatement, the law of the company of which the deceased was a member made the medical director's report adopted by the executive committee final.

In the absence of bad faith in such report, or in the action thereon by the company, I think the plaintiff is without remedy.

Judgment.

HAGARTY,  
C.J.O.

As pointed out by the trial Judge, the answer of the jury in effect negatived fraud, as they found in answer seven that the age of Redmond did not constitute one of the chief reasons for refusing to reinstate.

It was pressed by the plaintiff that the defendants desired to get out of the insurance contract on account of Redmond's advanced age. No evidence appears in the case to prevent the report, and the action thereon of the company, being binding on the party seeking reinstatement.

We cannot see how, on the evidence adduced, it can be proper to submit to a jury whether the medical examination shewed the applicant was in good health, or whether the medical director ought not reasonably to have been satisfied.

I think the whole facts were before the Court, and should have been finally dealt with there. We cannot accede to the apparent opinion that, in the absence of fraud or bad faith, it can be left to a jury to determine a matter left by the contract to the determination of the officials of the defendant company.

If we have to uphold the plaintiff's contention our decision would be of a very far reaching character, affecting a large class of cases, and possibly preventing a very common practice of accepting periodical payments after the appointed period of payment. It would be in fact to sanction the idea that indulgence in one or more cases must bar the insistence on punctuality of future payment.

The present may be a very unfortunate case for the widow and family, but we must not therefore make what would, I think, be a new rule to meet it.

OSLER, and MACLENNAN, JJ.A., concurred.

*Appeal allowed with costs.*

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## EDMONDS V. THE HAMILTON PROVIDENT AND LOAN SOCIETY.

*Mortgagor and Mortgagee—Interest—Insurance—Application of—R. S. O., (1887,) ch. 102, sec. 4—Reduction of damages.*

Under ordinary circumstances a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal is he bound to apply the balance in discharge of overdue interest.

Where damages were assessed by the trial Judge generally in favour of several plaintiffs whose rights and interests were distinct, and were apportioned equally between them by the Divisional Court, this Court while holding that one plaintiff only was entitled to recover reduced the damages apportioned to him, being of opinion that such damages were excessive; it appearing moreover that in the general assessment matters had been taken into consideration of which he was not entitled to complain.

*Corham v. Kingston*, 17 O. R. 432, considered.

Judgment of the Queen's Bench Division, 19 O. R. 677, varied.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 19 O. R. 677. Statement.

The facts were complicated and are set forth at length in the report in the Court below, and for the purposes of this report a very brief outline is sufficient.

The plaintiffs Harriet Edmonds and Leonard Edmonds, by indenture bearing date the 1st of July, 1887, made pursuant to the Act respecting Short Forms of mortgages, mortgaged their farm to the defendants to secure the repayment of \$2,700, to be advanced for the purpose of discharging encumbrances.

In December, 1888, some buildings on the farm, which had been insured by the mortgagors—loss, if any, payable to the mortgagees—were destroyed by fire, and the mortgagees received from the insurance company about \$350.

In February, 1889, the defendants offered the property for sale under power of sale, but the sale proved abortive. In August, 1889, the defendants distrained the goods and chattels on the mortgaged premises of the mortgagors, and

Statement. also of their son, the plaintiff Leslie Edmonds, who was tenant of the farm under them.

This action was then brought to have the mortgage rectified in certain particulars, and for damages for illegal distress, and the defendants counter-claimed for the amount secured by the mortgage.

The action was tried before ARMOUR, C. J., at Picton, on the 23rd of April, 1890. He dismissed the claim for rectification, but, thinking that he was bound so to do by the case of *Corham v. Kingston*, 17 O.R. 432, he held that the defendants should have applied the insurance moneys in discharge of the arrears of principal and interest, and that there was nothing due at the time of the distress. He therefore gave judgment in favour of the plaintiffs on that branch of the case, assessing the damages at \$600. In the Divisional Court the damages were apportioned, \$300 to the mortgagors, and \$300 to the son, but no other change was made.

The defendants appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A.] on the 2nd and 3rd of February, 1891.

*W. R. Meredith*, Q. C., and *John Crerar*, Q. C., for the appellants.

*Aylesworth*, Q. C., and *P. C. Macnee*, for the respondents.

May 12th, 1891. BURTON, J.A. :—

I entirely agree with my brother MACLENNAN as to the mode in which the interest in this case is to be computed.

The other questions present to my mind some features of difficulty.

The first of them is as to the application of the insurance money under the Act.

Before the Act it is clear that in the absence of express stipulation, there is no implied agreement that the policy

moneys when received, shall be applied in liquidation of the mortgage debt. The mortgagor might have stipulated that they should be so applied or in restoration of the premises, but in the absence of such stipulation, the mortgagee could hold the money until his debt was fully paid off.

Judgment.

BURTON,  
J.A.

What then is the effect of the recent statute, which provides, first, that all money payable on an insurance to a mortgagor, shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received; and, secondly, that without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage.

There is no such obligation or special contract here, and the effect of this and the previous sub-section appears to me to be this, that the mortgagee has an additional power to that previously enjoyed by him of requiring the mortgagor, if he receives the insurance money, to restore the premises to their former condition, so far as the money will extend, or he may require the money to be applied in liquidation of the mortgage debt, so that he has the power in the one case to insist upon the money being applied to the restoration of the mortgaged premises, and the right in the other to have the insurance money applied in liquidation of the mortgage. I think the statute does not apply to a case in which the mortgagee receives the insurance money, and he has still the legal right to say, I hold this money as I held the policy, as collateral or additional security for the sum secured by the mortgage, and I intend so to hold it. He was not bound to apply it, in my judgment, to any part of the principal sum so secured, because it happened to be due, much less to the payment of over due interest.

Whether having elected to apply a portion to the overdue principal he would be under any obligation to apply

Judgment. the balance upon any instalment of principal hereafter  
BURTON, falling due, we are not called upon to say.  
J.A.

I think the case referred to by the Chancellor in *Corham v. Kingston*, 17 O. R. 432, of *Ex parte Kemp*, L. R. 9 Ch. 383, is very clearly distinguishable.

In that case the question arose as to what passed to the assignee in bankruptcy as assets. *Primâ facie* everything belonging to the bankrupt would pass, and therefore if the case had turned upon the meaning of the word *due* then it would be obvious that all debts due to the bankrupt, whether presently due or payable in future would be included—the interpretation adopted.

— But in the interpretation of this statute, if it applies, very different considerations arise. The policy is intended as security during the full period that the mortgage has to run, for every portion of the mortgage debt. If \$1,000 is payable in five years and \$1,000 in ten it would seem to me, upon principle and in accordance with the authorities, the mortgagee could insist on retaining the insurance, even in excess of the balance of the mortgage money, till the balance became payable, for the property might decrease in value and interest cease to be paid thereon, leaving him — with a deficient security. That being so, it would require very plain language to deprive the mortgagee of that right.

I differ entirely with great respect from the learned Chancellor, and hold that in order to obtain the right to have the insurance money applied to the instalments as they mature, the mortgagor should have stipulated to that — effect in his contract.

I think, therefore, so far as the mortgagees were concerned, the distress was legal.

Then as to the seizure of Leslie Edmonds' goods. If the distress was *for interest simpliciter* under the terms of the mortgage, the clause authorizing the distress would amount to a license only, and would not warrant the — seizure of the goods of a stranger. That was always the law, although there was at one time some difference of opinion on the subject, and I think that the clause to be



found in the Act respecting Mortgages, R. S. O., (1887) ch. 102, sec. 16, must be confined, as its language plainly imports, to distresses of that kind, and though perhaps unnecessary, was intended *ex abundanti cautela* to remove doubt upon the subject.

Judgment.  
BURTON,  
J.A.

The section is found in the Act respecting Mortgages, and in the same statute the Legislature recognizes very distinctly the difference between a distress of this kind *for interest* by agreement or license, and *one for rent*.

In the very next section it is provided that as against creditors the right to distrain *for interest* or *for rent* in the nature of or in lieu of interest shall be restricted to one year's arrears.

Again, the Act respecting the Short Forms of Mortgages, R. S. O., (1887) ch. 107, whilst it contains a provision enabling the mortgagee to distrain for interest, contains no clause providing for the parties creating the relation of landlord and tenant with the reservation of a fixed rent, such rent being equivalent to the interest or to the interest and a certain proportion of the principal or otherwise, but such a course was not unusual. The right to distrain, however, in such a case was a common law right, and enabled the mortgagee as landlord to seize the goods of a stranger, not for interest, for that he had no right to do, but for the rent reserved by his lease.

That might be, and no doubt was very unjust, but the law allowed it, and sanctioned a mortgagee resorting to it as an additional security. That right he could only be deprived of by legislation so plainly expressed as to make it clear that that was the intention.

And accordingly we find the Legislature in 1887, by the 50 Vic. ch. 23, exempting the goods of a stranger from distress for rent in all cases where the tenancy was created after the 1st October, 1887, with certain exceptions, within which Leslie would come if the statute applied.

In construing an Act of Parliament, and more especially a modern Act of Parliament, in which it has been well

Judgment.  
BURTON,  
J.A.

said the Legislature is careful to express all it intends in so many words, it is only necessary to examine the words themselves—to go beyond their necessary implication, is to make not to interpret law. When we find that the law allows parties by agreement to distrain for interest, and we find distresses for interest alone referred to, I think we are bound to assume that they did not intend to interfere with distresses for rent, which, by the creation between the parties of the relation of landlord and tenant, became an incident of that relation.

I come, therefore, to the conclusion that these goods of Leslie's would have been liable to distress. But although these defendants might have distrained his goods as being upon the premises, they issued a warrant to distrain the goods of Harriet Jane Edmonds and Leonard Edmonds, which did not authorize the seizure of Leslie's goods, and such seizure would not have warranted an action against the company unless they had ratified and adopted it with knowledge of what had been done on their behalf.

Nothing was said on the argument about this, and so I should have assumed that the company had, with knowledge of the seizure, ratified and adopted it.

But in the view I take of the case it is unnecessary to consider this because I think we must now assume from the frame of the warrant, which authorizes the seizure of the goods of the mortgagor only, and from the fact that the amount distrained for includes principal as well as interest—the former of which could not have been distrained for at common law—I say we must now assume that this company intended to act upon the license, which would not authorize the seizure of Leslie's goods; an act which would in the first instance have made the bailiff only liable, but which they have now adopted.

I think, therefore, they are liable for this seizure, and although I think the amount of damages which my learned brothers think should be awarded exceedingly liberal I do not dissent from their conclusion.

I am of opinion therefore that the appeal as regards the

mortgagors should be allowed and the action dismissed, and as to Leslie the judgment below varied, and the damages reduced, and the counterclaim should be allowed for the amount due under the mortgage.

Judgment.

BURTON,  
J.A.

As the appellants have succeeded they should have their costs as against the mortgagors and should pay the costs of Leslie both here and in the Court below.

OSLER, J. A.:—

Not without doubt and reluctance I concur in the view that the interest in this case is to be computed from the actual dates of the advances made to discharge the incumbrances; and I wish to discountenance as strongly as I can the contention so stoutly argued for at the bar that where the parties plainly contract for payment of interest from any particular date, *e. g.* the date of the mortgage, their contract is not to govern where from delays caused by examining the title or arranging for the discharge of incumbrances or other causes not owing to the fault of the mortgagees, the money may not have been paid out until after the date when by contract the interest was to begin to run. If the mortgagee keeps the money ready, he ought to have the interest agreed upon, and the most the mortgagor can expect is that, as was done in this case, the mortgagee shall allow him such interest as the bank may have allowed him pending the completion of the transaction. No doubt such a contract should be clearly made out, as it may work a hardship on the mortgagor, and I yield to the opinion that it has not been so made out in this case.

The next question to be considered is as to the disposition of the insurance money. It arises upon sec. 4, sub-secs. (1) and (2) of the Act respecting Mortgages of Real Estate, R. S. O. (1887) ch. 102. The mortgage contains the usual short form clause of the covenant to insure. It does not appear whether the policy under which the money was paid

Judgment.

OSLER,  
J.A.)

was effected under this clause or not, but the mortgagees' right to control it seems to have been conceded at the trial.

The section enacts: (1) All money payable on an insurance to a mortgagor shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received. (2) Without prejudice to any obligation to the contrary imposed by law or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards the discharge of the money due under his mortgage: 49 Vic. ch. 20, sec. 9.

What is the meaning of the last clause? The mortgagees contended that they were not bound to make any particular application of the insurance, and were not bound to apply it upon the arrears of interest. The mortgagors on the other hand insisted that it should be set off against arrears of principal and interest, and then that nothing would be due at the time of the distress.

The origin of the section appears to be the Imperial "Conveyancing and Law of Property Act, 1881," sec. 23, sub-secs. (3), (4.) There is this difference in the language of our Act, which I think should make no difference in the construction: the former reads: "All moneys received on an insurance effected under the mortgage deed or under this Act;" while our Act is: "All money payable under an insurance to a mortgagor." The clause in the English Act is found in connection with many special provisions as to the mortgagee's power to insure, which are not in our Act, and which were substituted for those of Lord Cranworth's Act (1860), 23-24 Vic. ch. 145.

The latter were not adopted by us until 1879, 42 Vic. ch. 29, and are retained in section 18 of R. S. O. (1877) ch. 102.

So far as sub-section 1 is concerned it was, with us at least, merely declaratory of the mortgagee's right under the Metropolitan Building Act, 14 Geo. III., ch. 78. sec. 83: *Stinson v. Pennock*, 14 Gr. 604; *Curr v. Fire Assurance Association*, 14 O. R. 487.



It gives the mortgagee the right, where an insurance is effected by the mortgagor, even where there is no covenant on his part to insure, or a covenant to insure merely, but not to assign the policy, to require the money to be applied by him in making good the loss or damage. The case of *Lees v. Whiteley*, L. R. 2 Eq. 143, would now seem to be no longer law. There the mortgagors had insured in pursuance of a covenant to insure, but there was no covenant to assign the policy, nor any provision for the application of the insurance in case of fire in liquidation of the mortgage debt, and it was held that the mortgagees had no claim to the benefit of the policy.

Judgment.

OSLER,  
J.A.

Sub-section 2 confers on the mortgagee a new right, namely, the right to require that all moneys received on an insurance (possibly only an insurance effected under the mortgage) shall be applied in or towards the discharge of the money due under the mortgage.

The salvo in this sub-section "without prejudice to any obligation to the contrary imposed by law," seems to have lost its significance, now that the Metropolitan Building Act, is "not to be deemed to be in force with regard to property in this Province:" The Insurance Act, R. S. O. (1887), ch. 167, sec. 155 (50 Vic. ch. 26, sec. 154). An obligation imposed by special contract, means, I think, a special contract in relation to the insurance.

Still the question remains in what circumstances the option thus given to the mortgagee arises?

In *Gordon v. Ware Savings Bank*, 115 Mass. 588, it is said that insurance is for indemnity to the mortgagor, as well as the mortgagee. To the mortgagee it is for protection of the security, not for payment of the debt. It is collateral to the debt. Money received from insurance takes the place of the property destroyed, and is still collateral till applied in payment by mutual consent, or by some exercise by the mortgagee of the right to demand payment of the debt, and upon default of payment to convert the securities.

In *Fergus v. Wilmarth*, 7 N. E. Rep. 508, the mortgage

Judgment.

OSLER,  
J.A.

was made to a trustee for the creditor, and the question was as to the application of the insurance money.

The Court say the money took the place of the property destroyed by the fire, and was in the trustee's hands as part of the security for the debt. The creditor desired to have the money credited upon the debt, but Fergus (the debtor) was unwilling to have such application made of it. As the principal was not yet due, the trustee could not apply the fund to the reduction of the debt without the consent of Fergus, nor would it have been right for him to hand it over to Fergus to be applied in rebuilding, unless such application was in some way secured or made certain.

Jones on Mortgages, 4th ed., sec. 410 : "When the mortgaged property is insured for the benefit of the mortgagee, such insurance is collateral to the debt, and money received from the insurance is still collateral, and cannot be applied by the mortgagee to payment of the mortgage debt without the consent of the mortgagor, if the debt be not due, and if the mortgagee has no right to demand payment, or on default to convert the securities."

In *Austin v. Story*, 10 Gr. 306, the mortgagee had received the insurance money before the time appointed for payment of the money secured by the mortgage. It was held that he was entitled to interest without abatement notwithstanding.

VanKoughnet, C., said : "The insurance money stands, or should stand, in lieu of so much of the security as it covered. It should properly be used to replace the property in the position as nearly as possible in which it was at the time of the fire. The mortgagee is entitled to have his security kept up in value as far as it will go ; the mortgagor is entitled to have it expended on the property. The mortgagee, unless by strict stipulation, cannot, I apprehend, himself lay out the money, at all events when he is not in possession of the premises ; neither, I think, can he invest it in any other way without the assent of the mortgagor."

In *Green v. Hewer*, 21 C. P. 531, the mortgagee received

and retained the insurance money, but made no application of it. It was contended by a person who had become surety for payment by the mortgagor of the first instalment of the principal that the instalment had been satisfied, and that the bond had been discharged.

Judgment.

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OSLER,  
J.A.

The Court held otherwise and followed *Austin v. Story*, 10 Gr. 306. "The case," said Gwynne, J., (at p. 546) "appears to resolve itself into this, that either the insurance moneys received by the plaintiff, (there being no stipulation as to their application) have not been legally applied, and therefore cannot be regarded as applied in satisfaction of any part of the mortgage debt, or, if capable of being so applied, they may be so applied at the sole pleasure of the plaintiff in such a manner as to ensure to him the full benefit of his original contract."

Now the Act does not profess to interfere with any right the mortgagee had theretofore possessed to deal with the proceeds of the policy when the mortgage money was overdue. He was not compelled to apply it at all, or if he did apply it he might apply it in such a way as to preserve the full benefit of his contract. The new right or option which is given to him must I think be considered as one controlling any right which the mortgagor might otherwise have had to direct the disposition of the insurance received by or paid into the hands of the mortgagee before the mortgage debt becomes due. In effect the option given by the section is either to have the money applied in rebuilding or to have it at once applied in reducing the debt secured by the mortgage. If the latter option is not exercised the money remains in the mortgagee's hands (in those cases in which he has had, apart from the statute, the right to receive it) as it would have done before the Act, and subject to whatever rights or interests the parties by law respectively had therein, and *inter alia* to the right of the mortgagee to make such application of it as he might deem proper to the payment either of principal or of interest, or of both, overdue, or to make no application of it if he should deem it more advisable for the security

Judgment.

OSLER,  
J.A.

of his contract not to adopt that course, but to require the mortgagor to make his payments in accordance with his covenants.

As regards the case of the mortgagors, the appeal must be allowed, since there was at least \$126.33 due for interest at the time of the distress, which has not been discharged and which the mortgagees were not bound to discharge by any application of the insurance money.

✓ The plaintiff Leslie Edmonds stands in a different position. The power to distrain for arrears of instalments is at most a mere license under which the defendants could not justify the seizure of any goods but those of the licensors. The same may be said of the power contained in the short statutory form to distrain for arrears of interest which in this Court and in the Supreme Court has been held, even where found in connection with an attornment clause, not to confer upon the mortgagees the rights of a landlord: *Trust & Loan Co. v. Lawrason*, 10 S. C. R. 679.

Whatever may be thought of the soundness of that decision, the 16th section of R. S. O. (1887), ch. 102, now expressly enacts that the right of the mortgagee to distrain for interest in arrear, shall be limited to the goods and chattels of the mortgagor. This section has also, I think, the effect of limiting in the same way any right of distress which the mortgagees might otherwise have had under another clause in the mortgage by which the mortgagors "attorn to and become tenants at will to the mortgagees, at a rent equal in amount to the interest reserved, payable at the time mentioned in the proviso." The section is a general one, taken from section 3 of 49 Vic. ch. 29, "An Act respecting Landlords and Tenants and Distresses." Had it been intended to deal only with the mortgagee's right to distrain under a mere license, the enactment would have been unnecessary. I think the intention was to reach every case in which the mortgagee, whether in the character of landlord or licensee, but still under and for the purposes of the mortgage, had the right to distrain. The section is wide enough to cover



every case, and I cannot accede to the argument that the next section which is taken from a subsequent Act, controls its generality. See now the Landlords and Tenants Act, R. S. O. (1887), ch. 143, secs. 27-28.

Judgment.

OSLER,  
J.A.

But even if it be conceded that when the relation of landlord and tenant exists under the mortgage, section 16 does not apply, yet here we see from the distress warrant that the defendants were not distraining as landlords but as mortgagees.

The warrant is directed against the mortgagors by name, and comprises arrears of instalments for which, admittedly, the goods of a stranger cannot be distrained, as well as of interest. No question has been raised throughout the case as to the defendants' liability for the act of their bailiff in distraining the goods of Leslie Edmonds, and it sufficiently appears that they have adopted and ratified it to prevent them from now raising the question with success.

Whatever, therefore, may be thought to be the proper method of disposing of the insurance money, the defendants had no right to distrain upon the goods of Leslie Edmonds, and have no answer that I can see to his action. ✓

As to the damages. Although they are greatly in excess of any injury proved, it might have been difficult to interfere on that ground if we did not see for what they have been given, and how they have been made up: *Cockburn v. Edwards*, 18 Ch. D. 449, at pp. 459, 460.

At the trial they were assessed jointly to all the plaintiffs at \$600 for "the wrongful, illegal and unjustifiable proceedings" for the sale of the land and the distress.

In the Divisional Court the amount was distributed, \$300 to Leslie Edmonds, and \$300 to the other two plaintiffs; and that Court, though evidently dissatisfied, felt itself unable to interfere, all the plaintiffs being entitled to recover.

But if the mortgagors are not, as I hold, entitled to complain of the proceedings for the sale of the land, which have evidently entered largely into the assessment, neither can their tenant Leslie Edmonds complain of them, and

Judgment.

OSLER,  
J.A.

therefore two elements in the damages awarded, viz., the wrongful attempt to sell, and that the parties were prevented by those proceedings from putting in some of their crops, do not exist.

The seizure was a formal one, nothing was disturbed, everything went on as before, the bailiff contenting himself with the undertaking of Thomas Edmonds, another son of the mortgagor, residing on an adjoining farm, to look after the stuff. He agreed to give him \$1 per day, and \$45 for possession money, which has been allowed, whether really paid to him or not by any of the plaintiffs, no one has taken the trouble to enquire. It is to be assumed, therefore, that the receipt therefor put in at the trial is *bonâ fide*.

All the plaintiffs, we may assume, were at some trouble in procuring the \$100 which was paid into Court in this action as a condition of getting back their goods, and apart from this and the formal seizure there is no evidence of damage either in actual money loss or otherwise, of which Leslie Edmonds can complain.

It appears to me that the damages which have been awarded to him should be reduced by at least \$150.

MACLENNAN, J. A. :—

The first question in this case is as to the time from which interest ought to be charged against the plaintiffs. The mortgage is dated the 1st of July, 1887, and was executed about the same date. The mortgage acknowledges the receipt of the mortgage money, but the application shews that it was not intended to be advanced until after it was executed, and the mortgage itself provides that neither the execution nor registration of the mortgage should bind the mortgagees to advance the money. The correspondence between the company's solicitor and their inspector, through whom the mortgage transaction was arranged, shews that it was not intended to examine the title until after the mortgage was executed and registered,

and that that was the way in which the loan was carried out. The money was not, in truth, nor was any part of it, advanced at or before the execution of the mortgage, and the intention was, and so it was carried out, that it should be advanced by paying off existing encumbrances to the full amount, or nearly so, of the loan. The first payment was made on the 26th of September, and the remainder on the 20th of December. Cheques for the last payment, amounting together to \$2,025, were drawn by the company in September and November respectively, but they remained in the hands of the company's agents until the 20th of December, when they were paid over to the encumbrancers in satisfaction of their claims. The cause of this delay is not explained, except that it was due to "difficulty in settling with the encumbrancers," and in "getting the title made right."

Judgment.  
MACLENNAN,  
J.A.

The mortgage proviso stipulates that the principal sum of \$2,700 is to be paid with compound interest at  $6\frac{1}{2}$  per cent. per annum yearly; "the said principal sum to be paid as follows: the whole sum then outstanding to be due and payable on 1st July, 1897, repaying in the meantime \$100 yearly in reduction thereof, with interest on all unpaid principal in the meantime, calculated from the 1st day of July, 1887, at the rate aforesaid, payable yearly, on each first day of December, till the whole principal money and interest are paid, the first of such payments of interest amounting to \$73.12, to be paid on the first day of December, A. D. 1887."

The mortgage Act, R. S. O. (1887), ch. 102, sec. 5, provides that such a mortgage as this shall have implied therein a covenant for payment of the mortgage money and interest, and observance in other respects of the proviso in the mortgage, and it was contended that by reason of this covenant the plaintiffs were chargeable with interest from the date of the mortgage, notwithstanding that the money had not been advanced till long afterwards. The point was mentioned before the learned Judge at the trial, who promptly expressed his opinion against it, and it does not appear to have been

Judgment. afterwards seriously pressed until it came before this Court.  
 MACLENNAN, No case in point was cited, and I should have thought the  
 J.A. contention unworthy of attention, but for the strenuous way in which it was pressed upon us.

I think the principles on which Courts of Equity deal with mortgages, leave no room for argument that ordinarily a mortgagee can claim interest only from the time the money is advanced. The doctrine of equity, as I have always understood it to be, is, that a mortgagee shall not obtain an advantage by his security beyond his principal, interest, and costs. Whatever his security may be, whether land, chattels, bond, note, or covenant, the moment it is made to appear by legal evidence that it is a security, the party can recover in equity no more than his debt, interest and costs: Coote's Law of Mortgage, 5th ed., at pp. 16-17; *James v. Kerr*, 40 Ch. D. at pp. 459-60, and cases there cited, and particularly *Croft v. Graham*, 2 DeG. J. & S. 155; *Earl of Aylesford v. Morris*, L. R. 8 Ch. 484. It follows from this rule, that if a mortgage be for one sum, and a less sum be advanced, the mortgagee can only recover the smaller sum, notwithstanding any receipt, covenant, or bond or other obligation for a larger sum. The mortgage, receipt, or covenant, is *prima facie* evidence of the amount advanced; but when it is admitted or proved that a less sum than that named was advanced, all the provisions in the instrument are in equity made to conform to the less sum, including the interest. Since the abolition of the usury laws, no doubt, and perhaps even while they were in force: *Ex parte Banglay*, 1 Rose 168, parties to a mortgage might agree that the money should be regarded as the money of the borrower, and subject to interest from the day the mortgage was executed, though not to be advanced or applied until a later time, and remaining in the meantime in the possession of the lender. But in such a case, whatever profit, in the way of interest or otherwise, is made with the money in the meantime, belongs to the borrower. So also a person may now give a mortgage or bond for a larger sum in con-



sideration of the loan of a smaller sum, and that is good where such is the actual agreement of the parties, in the absence of fraud and oppression: *Mainland v. Upjohn*, 41 Ch. D. 126; *Marquess of Northampton v. Pollock*, 45 Ch. D. 190, 212; *Potter v. Edwards*, 26 L. J. Ch. 468. But there was nothing of that kind here. The mortgage itself stipulated that the company should not be obliged to advance the money, notwithstanding the execution or registration of the mortgage. As late as October, there were negotiations for making the loan \$3,000 instead of \$2,700, and for a higher rate of interest; and there were threats that the company would advance no more than the first payment of \$637. And it is clear that until the 20th of December, the \$2,025 was not in any sense the money of the borrower, but it continued to be the money of the company, which they were under no obligation whatever to advance. As I have remarked, the mortgage contains an admission that the money had been advanced, and the proviso and covenant for payment of interest are consistent with that having been done. The \$73.12 which was to be paid on the 1st of December, is just the interest which would be due on that day if the money had been in fact advanced. The whole instrument was drawn upon that theory; and I think if the mortgagor would not have been bound by reason of the covenant to pay the whole \$2,700 and interest if only part had been advanced, so no more is he obliged to pay interest on the money before he received it, nor while it was still in the hands of the company. It may be tested in this way. The first gale day was the 1st of December. On that day the company had only advanced \$637, and were under no obligation to advance more. If they had sued on that day could they have recovered interest on the whole \$2,700 in a Court of Equity? If the covenant was strong enough to enable them to recover, then they could sue for an instalment and interest on the 1st of December even if they had yet advanced nothing; and they might go on receiving the full interest for the

Judgment.

MACLENNAN  
J.A.

Judgment.  
MACLENNAN,  
J.A.      ten years without advancing another dollar. If there had been a time fixed for completing the loan, and if the borrower had been guilty of delay in clearing up the title, the company might have set apart the money, and notified the borrower that from that time it was his, and that he was under interest; but there is nothing in the case to shew that there was any unavoidable delay or any default. The title had to be cleared up, and that always takes more or less time, and as I have said it was intended to examine the title after, and not before, the execution of the mortgage, and if it had been otherwise there was no setting apart of the money, nor any notice that it was, or would be, idle in their hands. Interest is compensation for the use of money, and here it was the company that had the use of it. Yet they seek to make the plaintiffs pay the compensation. That it was not intended that the plaintiffs should pay interest until the money was advanced, is further made clear by this, that the company did not at any time, and do not now, claim interest from the date of the mortgage. In their accounts they make a deduction for delay of two months' interest. If there should be a deduction, why should it not be a just deduction, and why should the company arbitrarily fix the time when interest shall begin to run, and why should that not begin when they actually parted with their money?

I have found no actually decided case where an attempt was made in a Court of Equity, in the absence of some such agreement as I have mentioned, to claim interest on money for a term before it was actually advanced. I should have thought it elementary mortgage law, that in a case like the present no such claim could succeed. The principle is the same as that which prevents the recovery of the whole sum named in the mortgage, when only a smaller sum, part of what was intended, was advanced, and there is abundant authority for that. See the cases cited in 1 Holmsted's Rules and Orders, p. 248, Title "Taking Account." See also *Ex parte Osborne*, L. R. 10 Ch. at p. 47; and as to the bearing of the usury laws upon the ques-

tion: *Long v. Storie*, 9 Ha. 542; *Ex parte Banglay*, 1 Rose 168; also see *Trust and Loan Co. v. Kirk*, 8 P. R. 203. On the first point, therefore, I agree with the judgment, and I think the company were not entitled to charge interest on the loan, but from the time the cheques were handed over to the incumbrancers.

Judgment.  
MACLENNAN,  
J.A.

The next question is as to the application of the insurance money received by the defendants.

The mortgage is made in pursuance of the Act respecting Short Forms, and contains a covenant by the mortgagor to insure to \$800.

The Act provides merely, (sec. 12, Schedule B., R. S. O. (1887) ch. 107), that the mortgagor shall insure, pay premiums, and assign the policy, and if the mortgagee pay premiums, they shall be added to the mortgage debt, and be repayable, with interest, at the time of the next payment of interest. There is no direction as to how the insurance money, when recovered, shall be applied. There was an insurance in this case, which must be taken to have been in pursuance of the mortgage, and the company received \$358 on the 8th of January, 1889, on account of a loss by fire.

If I am right in holding that the defendants could only charge interest from the time the money was advanced, there would still be due to them on the 8th of January, at least \$322.33. The insurance money received was subject to a deduction of \$33, leaving \$325; and if applicable, or if applied to the payment of the arrears, would clear them off, and there would be nothing more in arrear until the following December. This action was commenced on the 3rd of August, and in answer to a motion for an injunction, the defendants produced a sworn statement of account in which \$200 of the insurance money was applied to the payment of the two instalments of principal which were in arrear, and the remaining \$125 was stated to be at the credit of the plaintiffs. I think the effect of that statement is, that the defendants hold the \$125 in reserve, and not applied upon the mortgage by way of payment, and the contention of the defendants is, that they have

Judgment. the right so to hold that sum; and that, therefore, there was at least an equivalent sum in arrear for interest, and the important question is, whether that is so. I understand the judgment of the Divisional Court to proceed upon sub-section (2) of section 4 of R. S. O. (1887) ch. 102, and to decide that the mortgagee having elected to apply the insurance money on his mortgage, must apply it in payment of arrears, and that having applied part on the arrears of principal, he was bound to apply the remainder to arrears of interest; and that, if that had been done, there would have been no arrears left. The learned Judge cited *Corham v. Kingston*, 17 O. R. 432, but that case is not quite like this. There the creditor applied the whole of the insurance money on his mortgage, computing interest to the day on which it was received, and then reducing the aggregate of principal money and interest on that day by the whole amount of the insurance. At that time there was nothing due, that is, payable, for either principal or interest; and the mortgagee was therefore paying himself money, none of which was yet actually payable. That was held to be wrong, and that the mortgagee electing to apply the insurance on the mortgage debt, must apply it only as the instalments matured. In the present case there were arrears, partly of principal and partly of interest. The mortgagee claims the right to apply the insurance to the arrears of principal, and to withhold the remainder without applying it to arrears of interest.

The question depends on the effect of the section (2) of the statute referred to, and upon the rights of the parties under the mortgage deed.

The Imperial Act, the Metropolitan Buildings Act, has no application, for that had been repealed the day before the mortgage was made: 50 Vic. ch. 26, sec. 154 (O.)

— The mortgage deed provided for this insurance. It was to be effected on the mortgagor's property, and at his expense, but it was to be assigned to the mortgagee. Obviously this was by way of additional security. This



insurance was as much a part of the security as the land, and like the land it was redeemable. The mortgage deed leaves it on the same footing exactly as the land; there is no special provision in it as to the application of the insurance money. All that is said is: "Provided this mortgage to be void," etc. When the instalments and interest are all paid the deed is to be void, and the securities, land, and insurance and all, are to go back. It seems to follow from this, that under such a mortgage deed, the insurance policy, and the insurance money, when received, are a security in the same sense, and to the same extent exactly, as the land, and are redeemable on the same terms, and not otherwise, and that the mortgagee may receive it and keep it just as he holds the land, until the last instalment of the mortgage debt becomes due. Every dollar of the insurance money is a security for every dollar of the debt, just as the whole mortgage debt is a charge upon every foot of the land. The mortgagee is not obliged to apply it to arrears either of principal or interest unless he pleases, any more than he is obliged, having a power of sale, to sell portions of the land from time to time for that purpose. He may keep the insurance money by him, and sue for arrears, or distrain for them, if he has that power, or he may at his option apply the whole or part of the insurance money to the arrears. It is part of his security, and whenever there is default he may resort to it, or he may resort to his personal or other remedies. Of course as soon as the debt is reduced to an equality with the insurance money in his hands he must apply the latter *pro tanto* from time to time to subsequently maturing payments. It hardly needs to be added that a mortgagee retaining insurance money in his hands as security for future payments is accountable for any profit he makes with it, and that he ought not to leave it lying idle, but ought, if possible, to concur with the mortgagor in some profitable way of laying it out. So far as the provisions of the mortgage deed are concerned, therefore, I am clearly of opinion that the defendants were

Judgment.

MACLENNAN,  
J.A.

Judgment.  
MACLENNAN,  
J.A. entirely within their right in abstaining from applying the insurance money to arrears any farther than they did, and that they have a right to say that when the acts complained of took place there was at least \$125 of interest in arrear upon their mortgage security.

It is, however, contended that the statute required the whole of the money to be applied to arrears. I am, with great respect, unable to agree to that contention. The statute is evidently intended for the benefit of the mortgagee. The first sub-section deals with insurance money received by the mortgagor, and its apparent effect is to enable the mortgagee to require, if he thinks fit, that any insurance money received by the mortgagor shall be applied in restoring the premises burned, or as it is expressed, "in making good the loss or damage," and that even in the absence of any agreement to insure contained in the mortgage. Then sub-section (2) enables him to require that money received on an insurance shall be applied towards the discharge of the money due under his mortgage. This clause does not say money received by the mortgagor, but I apprehend it means that, for no provision was required with reference to money received by the mortgagee. The mortgagee could apply insurance money received by himself, without the aid of the statute. Again, this power is given to the mortgagee subject to any obligation imposed by law, or by special contract. The obligation imposed by law, here referred to, is probably the Imperial Metropolitan Buildings Act, already referred to, which was not repealed until a year afterwards. In the present case there is no provision by special contract as to the application of the money, and there is nothing either by law or special contract to exclude the operation of the statute if it be otherwise applicable. I do not see, however, that it is applicable.

The insurance money belonged to the mortgagee and was his property subject to redemption on certain terms. The mortgagee was content with that, and he did not *require* anything to be done with it. He stood on the right which his mortgage gave him, and held and used it

as a security. The instalments not having been paid by the mortgagor, he did as he had a right to do, but was not obliged to do, he applied \$200 of it towards the instalments, and kept the remainder in hand as a security. I agree with the decision in *Corham v. Kingston*, 17 O. R. 432, to this extent, that the mortgagee was not entitled to apply the insurance money to the payment of principal or interest not yet due, but with great respect, for the reasons I have just endeavoured to express, I think that decision wrong so far as it may be supposed to have decided that the mortgagee was obliged to apply the insurance money to the instalments and interest as they matured, and could not keep it in reserve, and sue the mortgagor for the instalments, in case of default.

Judgment.  
MACLENNAN,  
J.A.

I think the above conclusions as to the insurance money are in accordance with *Austin v. Story*, 10 Gr. 306, and *Green v. Hewer*, 21 C. P. 531; and also with *Cockburn v. Edwards* 18 Ch. D. 449; and if so, it follows that when the defendants distrained, there was an arrear of \$125 of interest due on the mortgage, and that as against the mortgagors, neither the distress nor the other proceedings complained of were illegal, and that the action fails so far as the mortgagors are concerned.

It is different, however, as regards the other plaintiff, Leslie Edmonds. By section 16 of the Mortgage Act, R. S. O. (1887) ch. 102, the right of a mortgagee to distrain for interest is limited to the goods and chattels of the mortgagor, and the defendants had, therefore, no right to take Leslie Edmonds' goods. The statute is remedial and intended to protect the goods of strangers to the mortgage. Its language is general, and in terms covers every case of distress by a mortgagee for interest.

This being such a case, I am, after repeated consideration of the point, unable to take the view just expressed by my brother BURTON, and I think we have no right by construction to restrict the operation of the Act to a case of license, and to except a case of attornment such as this.

I think, therefore, the appeal ought to succeed against

Judgment. the plaintiffs, the mortgagors, but ought to be dismissed as  
 MACLENNAN, against Leslie Edmonds; and I think the damages awarded  
 J.A. to him should be reduced to \$150.

HAGARTY, C. J. O., concurred with OSLER, and MACLENNAN, JJ.A.

*Appeal allowed in part.*

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### GRIFFITH V. CROCKER.

*Payment—Debtor and Creditor—Accounts—Appropriation of payments.*

Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness.

Judgment of STREET, J., reversed.

Statement. THIS was an appeal by the defendants Crocker & Son, from the judgment of STREET, J.

The plaintiffs were execution creditors of the defendant Demare, and brought the action to set aside a chattel mortgage, dated the 25th of March, 1885, made by him in favour of his codefendants, Crocker & Son.

The action was tried before STREET, J., at London, on the 17th of May, 1890. The plaintiffs completely failed in their attack upon the validity of the mortgage, but they contended that the mortgage had, in effect, been paid off.

The facts were shortly as follows:

Demare was carrying on the business of a country storekeeper, and on the 25th of March, 1885, he was indebted to the defendants, Crocker & Son, in the sum of about \$1,600 for goods sold by them to him; part of this indebtedness being represented by notes, which were then



current ; the balance being an open account for goods. *Statement.* Crocker & Son thought that the account was getting too large, and they asked Demare for security, and obtained a chattel mortgage on his stock for \$1,600, with interest at eight per cent., payable at the end of three months from the date of the chattel mortgage. It was given on the 25th of March, 1885, and was in form an ordinary chattel mortgage to secure a then existing debt. The chattel mortgage was renewed from time to time ; the last renewal being in March, 1889. At that time the amount claimed in the statement annexed to it was \$1,600 with four years' interest at eight per cent. After the chattel mortgage was given, the parties continued dealing to a very considerable extent ; Crocker & Son sold goods to the amount of \$1,000 or \$1,500 a year at the least to Demare, but no new account was opened in their ledger. The account appeared as an open account for some time before and for some time after the giving of the chattel mortgage ; notes which were current at the time of the chattel mortgage were charged in the ledger to Demare, and payments were credited generally and new notes were taken from time to time, and were charged up at maturity. A settlement appeared to have taken place between them on the 26th of May, 1886. At that time the balance shown in the ledger against Demare was \$1,291.59, and there were three notes current for \$500 each ; so that the whole amount due was \$2,791.59, and that included any balance under the chattel mortgage. They went on again after that settlement ; moneys were paid and credited in the ledger generally, and the notes which were current became due and were charged against the account. More goods were sold ; more payments were made, and then on the 30th of September, 1887, another balance was struck and two notes were taken, one for \$1,820, apparently representing the balance ; and another, for \$500, covering the outstanding account. Demare was credited with these notes in the account, and the account went on in the same way as before. The total amount of the debits from

Statement. May, 1886, to September, 1887, was \$8,418 ; that included goods sold and notes which became due which were charged up from time to time. In the year 1889, Demare got into difficulties, and Crocker & Son seized under the chattel mortgage, claiming \$1,600, with four years' interest.

STREET, J., held that the debt that was due at the time the chattel mortgage was given, was extinguished by the payments which were made afterwards, laying great stress upon the mode in which the account had been kept.

The defendants appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 12th and 13th of March, 1891.

*J. H. Coyne*, for the appellants. The question of appropriation of payments is one of intent to be gathered from the acts and conduct of the parties. The evidence in this case showed an arrangement or understanding between the parties from the beginning, that the payments were to be applied first on the new or unsecured account; and an actual appropriation by the acts of the defendants, Crocker & Son, in renewing the chattel mortgage from year to year for the full \$1,600 and interest, and in taking possession of the mortgaged property prior to the commencement of this action, of the payments on the account subsequent to March 25th, 1885. This was not objected to by Demare; but on the contrary, he always assented to and acquiesced in it as being in accordance with his understanding of the object of the security. Under these circumstances the mode of keeping the account in the books of Crocker & Son does not preclude them from showing what was the real object and intention. See *Peters v. Anderson*, 5 Taunt. 596; *Wilson v. Hirst*, 4 B. & Ad. 760; *Henniker v. Wigg*, 4 Q. B. 792; *Simson v. Ingham*, 2 B. & C. 65; *Birkett v. McGuire*, 7 A. R. 53; *City Discount Co. v. McLean*, L. R. 9 C. P. 692.

*Gibbons*, Q. C., for the respondents. The accounts were closed from time to time by notes in such a way that it is impossible for any one to distinguish the chattel mortgage account from the general account. They were treated as one, and the payments applied on the general account. The only pretence of evidence of any agreement to apply the payments on the new account was furnished by the fact of the continued renewal of the chattel mortgage with the knowledge of the debtor. But as the chattel mortgage was thought to be security too for the new goods, it affords no evidence whatever of an intention to keep alive the old debt. Admittedly, the chattel mortgage is paid off by the payments, if they are to be applied to the older items, and in the absence of specific appropriation this is the rule. See *Smith's Mercantile Law*, 10th ed., p. 678, and cases there cited; particularly *Hooper v. Keay*, 1 Q. B. D. 178. See also *Re Browne*, 2 Gr. 111, 590.

*Coyne*, in reply.

May 12th, 1891. BURTON, J. A. :—

This action was launched as one to set aside a mortgage given by one Demare to the defendants, Crocker & Son, as fraudulent under the Act, R. S. O. (1887), ch. 124, and the plaintiffs failed to sustain their action on that ground; but they then attempted to shew that the mortgage had in effect been paid by reason of the course of dealings between Demare and Crocker & Son, subsequent to the giving of the mortgage.

The mortgage was given on the 25th of March, 1885, to secure a sum of \$1,600, for which Demare was indebted to Crocker & Son, at the time, and was to be payable at three months, with interest at the rate of eight per cent.

The mortgage was duly registered and was renewed at the expiration of each year for four years, interest being added at the time of each renewal.

The mortgagees went into possession of the property under their chattel mortgage, about the 1st of February,

Judgment.

BURTON,  
J.A.

1890, and were in possession when the plaintiffs issued their execution and claimed to seize the same. It is important to bear this in mind when considering the question of appropriation of payments; it is not like the cases where there has been a change of parties, as in partnership cases, and the account apparently continued as if no alteration had happened.

It was a transaction between these two parties, mortgagor and mortgagees, and the plaintiffs were strangers to the transaction, and had no right or claim in the goods until they came with their execution.

Here it is in evidence that Crocker & Son refused to continue to furnish goods to Demare unless he furnished security for his existing indebtedness; and if at the time of the mortgage he had balanced the account in the books, bringing down the balance of \$1,600, and adding some such words as "secured by mortgage," although that item had still appeared in the general account as the first item of the continuation of the account for new goods and payments as they appear in the books on the credit side of the account, I should have thought it impossible for Demare to insist that the payments made from time to time without specific appropriation by him, should be credited on account of the mortgage. That would be, as said by Baron Bramwell, in the *City Discount Co. v. McLean*, 9 C. P. 692, to hold something absurdly contrary to what may be presumed to have been in the contemplation of the parties.

The goods mortgaged were with the other goods being sold from time to time, and the mortgage would have been a perfectly illusory security but for a clause which extended it not only to the existing stock, but "to all goods and stock-in-trade of what nature or kind soever, which may be hereafter acquired by the mortgagor, and in his possession on the said described premises during the currency or continuance of this mortgage, or any renewal or renewals thereof;" and this is all probably that the mortgagees meant when they referred to it as a continuing security.



Here the parties contemplated that the then debt should be secured before any fresh goods were supplied. It was contemplated that that debt would not be paid off in three months, for they provided for a renewal or renewals of the mortgage; and they contemplated that before being paid, the whole of these goods might have been sold, and so provided for other goods taking their place. *Primâ facie*, therefore, it would seem clear that the debt so secured was not to be affected by the subsequent dealings.

Judgment.

BURTON,  
J.A.

There was nothing at all strange in the account being continued as it was in Crocker & Son's books, and but for that there would not, I think, have been a shadow of an argument that these subsequent payments should apply to it. I apprehend if Demare had, in any of his letters, directed that the payments should be applied on the secured debt, his creditor would have made short work of it, and would at once have realized the security.

I regard the mode in which the account was kept in the books, as a mere matter of bookkeeping. A rather careless way of keeping the account it may be, but one which Demare himself would not, upon the evidence in this case, have been entitled to treat as an extinguishment of the security, which it was the intention of both parties to keep alive.

The learned Judge seems to have been much influenced in the conclusion he arrive'd at from a supposed conflict in the evidence given by Mr. Crocker at the trial, and that given on his examination for discovery a few days previously. It does not strike me that the two statements are necessarily inconsistent. I think the mortgage was given for a specific debt, and that no evidence would have been properly receivable to show that it was intended to be a continuing security; but the interpretation I place upon the defendant's statement is, that as by the terms of the mortgage property subsequently acquired was to be covered by it, he still considered it as security for the debt, although a considerable portion of that covered by it when first created had disappeared; but on both occasions, and

Judgment.

BURTON,  
J.A.

there is no evidence to the contrary, he swears that the debtor made no specific appropriation of the money, and it was open to the creditor to do so at any time before the rights of others had intervened.

There is no question at the present day of the correctness of the principle laid down in *Clayton's Case*, 1 Mer. 572, where applicable.

In most of the cases in which the rule has been applied, there had been a change of parties, and the account continued as if no alteration had happened; but where as in this case, it is clear that it never could have been the intention that the payments should be applied to destroy the security, the inference is the other way, and it would require very strong evidence to establish that the moneys were to be so appropriated.

I think the *City Discount Co. v. McLean*, L. R. 9 C. P. 692, a very strong authority in favour of the appellants, both upon this point and the effect of taking the bills or notes from time to time, which were never intended to be taken in settlement or satisfaction, or to be paid by the debtor at maturity.

The mode of keeping the account in the books, even though seen by the debtor, did not preclude the creditor from showing the real object and intention of the debtor and himself. Everything upon the face of the transactions themselves, tends to show that it must have been the intention to keep alive this security, and the evidence strongly supports it.

I adhere fully to the expressions used by me in *Birkett v. McGuire*, 7 A. R. 53, but I think the circumstances in this case make all the difference.

We were referred to an early case in this Court, *Re Browne*, 2 Gr. 111 and 590, as being opposed to this view. I do not think it is. The Court there thought the evidence very unsatisfactory, and the positions taken at various times inconsistent with each other; but they came to the conclusion, upon the evidence, that there had been such a course of dealing by the creditors as to amount to an

appropriation by them of the moneys to the debt secured by the mortgage; and the question apparently arose in that case between innocent purchasers, upon one of whom the loss had to fall.

I think in the present case there was a distinct appropriation by the creditor of the moneys to the items of the account other than those secured by the mortgage before the execution creditors' claim intervened; and am of opinion, with great respect, that the judgment should be reversed and entered for the appellants.

The case of *Fenton v. Blackwood*, L. R. 5 P. C. 167, was not referred to on the argument, but is authority of our highest appellate tribunal in support of the view, that it ought not to be inferred from the mere rendering of accounts to show the general nature of the accounts, without other evidence, that the creditors intended to give up the special securities they might have in respect of any item contained in such account. See also *Daniell v. Sinclair*, 6 App. Cas. 181.

OSLER, J. A. :—

The action was brought by the plaintiffs as execution creditors of the defendant Demare, to set aside as fraudulent and void under the Statute of Elizabeth, or the Assignment Act, a chattel mortgage dated the 25th of March, 1885, made by Demare to his codefendants, Crocker & Sons.

The goods covered by the mortgage had been taken possession of by the mortgagees before execution was issued, and it is alleged that long before this, the mortgage had been paid.

At the trial the case turned wholly upon the last point. The learned Judge held that the mortgage had been given for a debt due at the time, which debt was extinguished by the payments afterwards made in the course of dealing between the parties; the notes and accounts current and existent at the date of the mortgage having been so blen-

Judgment.  
BURTON,  
J.A.

Judgment.

OSLER,  
J.A.

ded with notes and accounts in their subsequent dealings, that it was impossible to separate them.

The plaintiffs are strangers to the transactions between the defendants, and strangers to the property mortgaged. They cannot be in a better position than the mortgagor, nor succeed in this action except by shewing that he was entitled to treat the mortgage debt as having been paid. The plaintiffs were unable to point to anything in the evidence which shewed an expressed intention on the part either of the Crockers or of Demare, to apply the payments made by the latter upon the mortgage. They were driven to rely upon the fact that in the books of the former, the account which had been secured by the mortgage, had been so continued and blended with the subsequent accounts and dealings between the parties as to make it now impossible to distinguish the original debt for which the mortgage had been taken, and therefore that in point of law, the debt must be taken to have been paid by the appropriation of the payments to the earlier debt; the result of which would be that the mortgage must be regarded as paid off, and the balance due on the general account treated as an unsecured debt. The plaintiffs insisted in short that the case was governed by *Clayton's Case*, 1 Mer. 572. But I think with deference to the learned Judge whose decision is in review, that the evidence ought to lead to the conclusion that it comes within cases of another class.

The parties interested remain the same, and it was apparent that when the mortgage was taken they intended to continue, and they did continue their dealings together.

The mortgagor continued to buy goods from the mortgagees and to make remittances from time to time, and I think it cannot be inferred from the manner in which the accounts were kept, or from the fact that balances were struck from time to time, and notes taken, that the payments were intended to go in discharge of the mortgage.

I cannot make out from the evidence that the accounts



were actually rendered, and although notes were taken, they did not strictly represent the accounts. They were either not used, or if ever put in the bank, were not paid by Demare, and were charged back to him in the books. Many, if not most of them, were \$500 notes, bearing no particular relation to the debt, except as acknowledgments; nor has, in my opinion, the demand note, upon the taking of which so much stress was laid, any greater significance.

In the *City Discount Co. v. McLean*, L. R. 9 C. P. 692; 30 L. T. N. S. 883; 43 L. J. C. P. 344, Blackburn, J., says: (30 L. T. N. S. at p. 887) "Has the right of appropriation been exercised in this case? Was the rendering of an account equivalent to an appropriation? I think the answers to these questions depend upon the situation and intentions of the parties, and I cannot draw the inference of fact that persons carrying on such a business as that of the plaintiffs wished the (account) to be paid off." Then he cites with approval, *Henniker v. Wigg*, 4 Q. B. 792, where Lord Denman, while recognizing with approval the decision in *Clayton's Case*, 1 Mer. 572, says: It is equally certain that a particular mode of dealing, and more especially any stipulation between the parties, may entirely vary the case, "and it was accordingly held" continues Blackburn, J., "that where a bond is given to secure payment by A. to B. of a specified sum, it is not an invariable rule of law that all payments made by A. are to be applied in immediate and final liquidation of the sum named, or of the first items in A.'s debit, or that even if A., on a long course of transactions, should, after the giving of the bond, be for some time in advance to B., the bond is thereby satisfied."

In the Law Journal report, the same learned Judge (Blackburn, J.), is thus reported (at p. 350): "It is said that when a balance was struck between the plaintiffs and Southgate, (the principal debtor) a fresh start was made in the transactions existing between them. I do not quite agree with that. *Clayton's Case* related to a change of parties by death. \* \* The question is, whether there was a

Judgment.

OSLER,  
J.A.

Judgment.

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OSLER,  
J.A.

change in the relationship existing between the plaintiffs and Southgate as to the guaranteed debt? Now it is to be recollected that the plaintiffs held security, and it is not to be assumed that they would be willing to appropriate payments made by the principal debtor to the liquidation of the amount which was secured to them by the defendant and other persons. No conclusion can be drawn that the plaintiffs intended to absolve the parties to the guarantee." The principles laid down in this case, and in that of *Fenton v. Blackwood*, L. R. 5 P. C. 167, were applied and acted on by this Court in *Cameron v. Kerr*, 3 A. R. 30, and in *Merchants' Bank v. Moffatt*, 5 O. R. 122.

The circumstances of course vary, but the principle is, that mere bookkeeping, or accommodation, or discounting arrangements, do not by any rule of law as to imputation or appropriation of payments have the effect of discharging a security, if there is anything to show a contrary intention. Then what is there here to indicate that the accounts and notes between the parties ought not to be taken as proving an intention to appropriate the payments as against the mortgage debt? There is, first, the fact that the mortgage itself provides that all future goods and stock-in-trade brought on the premises during the continuance of the security, or of any renewal of it shall be subject to the mortgage, so that the renewal or continuance of the mortgage was in contemplation of the parties, though the amount secured is expressed to be payable at three months from date. Then there is the improbability alluded to in more than one of the cases that the holder of the security would be willing to appropriate payments made while other debts were being all the time incurred, to the satisfaction of a secured debt; and lastly, what I think ought to be taken as conclusive against any such appropriation, and as shewing by the conduct and agreement of the parties that the mortgage debt still subsisted, there is the fact that the mortgagees renewed the mortgage no less than four times before taking possession of the goods; and on each occasion swore that the mortgage

debt and interest from the date remained wholly due and unpaid. This appears to have been done with the knowledge of the debtor, out of whose possession the goods were ultimately taken, but who never objected that the payments made by him, had been misapplied, or that the mortgage debt had been reduced or discharged. In the face of this it is impossible to say that the debtor could have successfully contended that the mortgage was paid, and his execution creditors, the plaintiffs, are in no better position. The mortgage account, in short, repels the inference of an intention to appropriate the payment upon the secured debt more potently than the bookkeeping entries lead to an opposite inference.

The appeal should therefore be allowed and the action dismissed with costs.

Judgment.

OSLER,  
J.A.

MACLENNAN, J. A. :—

With great respect I think this appeal should be allowed.

I am unable to distinguish this case from *Cameron v. Kerr*, 3 A. R. 30; *City Discount Company v. McLean*, L. R. 9 C. P. 692, and *Fenton v. Blackwood*, L. R. 5 P. C. 167.

The mortgage was for \$1,600 and interest, and was to be paid at the end of three months. It was renewed, year by year, for several years, as prescribed by the Bills of Sale Act, with sworn statements that the full amount and interest was still due. In point of fact there never was a time from the making of the mortgage until the present action was brought, when a less sum was due from the debtor to the appellants than the amount of the mortgage and interest. The debtor, however, continued to buy goods and make payments, and if the payments were applied on the mortgage, and not on the goods, the mortgage is now paid of; but if applied on the goods, the mortgage is still in force for the full amount.

It is admitted that the debtor never made a payment expressly on the mortgage; and it is not suggested that

Judgment. the mortgagees ever expressly or deliberately did so either.  
MACLENNAN, What was done, however, was, that the mortgagees put down  
J.A. in an account in their ledger, just as they had done before the mortgage, all their dealings with their debtor, the goods they sold to him, and the cash they received from him, from time to time. They took notes from the debtor from time to time; on two occasions demand notes, for the exact balance due, and these notes were also put down in the account just the same as the goods and cash. This account was a continuation of the account as it stood on the day the mortgage was given, and included the mortgage debt; but no mention whatever of the mortgage was made in the account. In fact the account would always shew by striking a balance, the full amount that was due from the debtor to his creditor, over and above the notes which he had given.

The contention is, that the effect of keeping the account in this manner is, that the debt which existed when the mortgage was given, has been extinguished, and that nothing is now due: *Clayton's Case*, 1 Mer. 572.

I think it is impossible to believe that it was the intention of either the debtor or the creditor, that the payments made from time to time, should be applied on the mortgage; or that the payments were set down in the account with any such idea.

The annual renewal of the mortgage is conclusive on that point, taken in connection with the absence of any express appropriation in any single instance by either debtor or creditor. The renewals were solemn, deliberate acts, attested by the oath of the creditor on each occasion and supported by the oath of both debtor and creditor at the trial. The language of the Lords of the Privy Council in *Fenton v. Blackwood*, L. R. 5 P. C. at p. 176, is entirely applicable here, which is as follows: "The accounts appear to have been made out in ordinary course as between merchants, to shew the general state of their dealings, but it ought not to be presumed that this form of statement was intended to alter the substance of the transactions between them, so as to make the debit of the sums paid for discount



operate as satisfaction of the interest secured by the mortgage." Judgment.

MACLENNAN,  
J.A.

Nor do I think this conclusion affected by the circumstance of the taking of notes from time to time, whether for part of the debt or for the whole sum that was due, for it is clear the notes were not taken in satisfaction of the debt, but merely for convenience. Nor do I think that any thing that was said by the defendant in his evidence or depositions at all compels the conclusion that the payments must be applied on the mortgage. A layman's notions of the meaning of a continuing security, or of a mortgage for a floating balance, are probably in most cases vague enough ; but I can entertain no doubt that this defendant believed he had got security for a certain part of his debt, and never meant to reduce his security, while at the same time the debt was not being reduced but was being increased.

HAGARTY, C. J. O., concurred.

*Appeal allowed with costs.*

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## MARTIN V. MAGEE.

*Vendor and Purchaser—Title—Devolution of Estates Act—R. S. O. (1887), ch. 108.*

Under the Devolution of Estates Act, the legal estate in the deceased's land vests in his legal personal representative; and the beneficial owner, whether the debts of the deceased are paid or not, cannot make a good title without a conveyance from the legal personal representative. Judgment of the Chancery Division, 19 O. R. 705, reversed.

Statement. THIS was an appeal by the plaintiff from the judgment of the Chancery Division, reported 19 O. R. 705.

The action was brought by the plaintiff who had agreed to purchase certain land, to recover the deposit paid on the contract of sale. The defendants alleged that it was forfeited by reason of his noncompliance with the terms of the contract.

The defendants sold as executors and devisees in trust of Mrs. Catherine Sheppard, who died on the 20th of February, 1889, her will being dated the 16th of the same month.

They made title under the will of Herbert C. Sheppard, who died on the 10th of February, 1889, his will being dated the 23rd of August, 1888. By it he devised the property in question to his mother the above-mentioned Catherine Sheppard in fee and appointed one A. R. Blackburn his executor. Blackburn duly proved the will. The contract of sale between the plaintiff and the defendants was dated the 20th of April, 1889. The conditions of sale provided, *inter alia* :

3. The purchaser shall at the time of sale pay down a deposit of ten per cent. and shall pay the remainder of the purchase money within two weeks after the sale; and upon such payment shall be entitled to the conveyance and to be let into possession.

4. The vendors shall furnish a registrar's abstract of title and such title deeds as may be in their possession only, together with a deed of the property; the purchaser is to

verify the title at his own expense and be at all further *Statement.* expense arising out of the purchase.

6. If the purchaser fails to comply with the conditions aforesaid or any of them the deposit and all other payments made thereon shall be forfeited and the premises may be resold; and the deficiency, if any, by such resale together with all charges attending the same or occasioned by the defaulter are to be made good by the defaulter.

The plaintiff contended that the defendants were not entitled to forfeit his deposit as they did, and that he was entitled to recover it in this action.

The question was whether the plaintiff was in default under the terms of the contract. The defendants treated him as being so by serving him with a notice that his deposit was forfeited, and by reselling or attempting to resell the property.

He had objected to carry out the contract on two grounds: the one that he had been induced to bid in consequence of misrepresentations as to the character, situation and value of the property; and he claimed a reduction of the purchase money, or a return of the deposit on that ground; and the other an objection to the title as disclosed by the abstract, hereinafter mentioned. The vendors contended that he was wrong on both points.

At the trial, before FERGUSON, J., the contest was chiefly with regard to the question of misrepresentations which was found against the plaintiff, as was also the question of title. The latter was the only one raised before the Divisional Court and on this appeal. As to it, the facts appearing were, that in the requisitions on title the plaintiff's solicitors stated: "The lands of H. C. Sheppard vested in his executor: required a conveyance from the executor." The vendors' solicitor answered by saying: "I do not see what the executor of H. C. Sheppard has to do with the property." A similar reply was given in subsequent communications of the 17th of May, and again on the 29th of May, 1889: "We do not see how these lands vested in the executor, and do not think he is a necessary party."

Statement.

On the 1st of June the purchaser's solicitors wrote: "We find the title insufficient. You have our objections. We understand that you cannot or will not satisfy our requisitions. If you cannot or will not we would ask for a return of the deposit. If you are able or willing to satisfy our requisitions you should be able to do so within two weeks from this date. We therefore notify you that we make time the essence of the contract, that unless you make a good title by the 16th inst., we will consider the contract at an end, and require payment of the deposit," etc.

On the 6th of June this was answered by a letter from the agents of the vendors' solicitors stating that declarations answering the requisitions in every respect had been *registered* and requesting to be informed in what respect they were deficient.

On the 15th of June a deed was tendered by the vendors' solicitors to the purchaser's solicitors as being a sufficient conveyance under the contract. The executor of H. C. Sheppard was not a party. This was refused and afterwards on the 20th of June, as stated on the argument and alleged in the defence, notice was served declaring the deposit forfeited, and stating that the vendors would resell as they soon after attempted to do.

FERGUSON, J., dismissed the action and his judgment was affirmed by the Divisional Court.

The plaintiff appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 16th of March, 1891.

*E. D. Armour*, Q. C., and *D. Macdonald*, for the appellant.

*Hoyles*, Q. C., and *J. Chisholm*, for the respondents.



May 12th, 1891.—OSLER, J. A.

Judgment.

OSLER,  
J.A.

[The learned Judge stated the facts as above set out, and continued:]

I cannot see my way to hold as my learned brother FERGUSON held at the trial, that the purchaser was disabled from contending that the vendors had no title or a defective title, because he had also objected to complete the contract on another ground which he failed to prove, nor was that view adopted by the Divisional Court in affirming the judgment. We must see what is the value of the other objection, for if the defendants were in the wrong as to that, the right to forfeit the deposit could not arise under the conditions of sale.

The vendors' solicitors would appear to have overlooked the provisions of the Devolution of Estates Act as they evidently failed to see the object of the requisition for a conveyance from H. C. Sheppard. They persisted in the opinion that such a conveyance was unnecessary and ultimately treated the purchaser as in default for insisting upon it or for refusing to accept a conveyance to which the executor was not a party. The purchaser may not have been bound to state the requisition more fully than he did or the reason of it, but I have no doubt that he saw the error under which the vendors' solicitors were labouring, and determined to use it in aid of his intention to escape from the contract. We cannot, however, look at the parties from the standpoint of an action for specific performance by the vendors, in which, the purchaser not having repudiated on the ground of want of title in the vendors, the latter might have had judgment with a reference, in the course of which the title might be shewn to have been procured or completed. They undertook to enforce the conditions and the plaintiff says: I am willing to treat the contract as being off, as that is the position you take, but as I was not in default you must return my deposit. The onus of proving that he was in default rests on the defendants

Judgment.

OSLER,  
J.A.

who set up the forfeiture. Whether or not they are right in their contention depends upon the effect of those sections of the Devolution of Estates Act, R. S. O. (1887,) ch. 108, which regulate the disposition of the estates of persons dying on or after the 1st of July, 1886. These are sections 3 to 10 inclusive. In the main they seem to have been taken from an Act of the Province of New South Wales, No. 20 of 26 Vic. See *Plomley v. Shepherd*, 64 L. T. N. S. 94; [1891] A. C. 244.

Section 3 enacts that those sections shall apply to (a) all estates of inheritance in fee simple, or limited to the heir as special occupant, in any tenements or hereditaments in Ontario, whether corporeal or incorporeal; (b) to chattels real in Ontario; (c) to all other personal property of any person who has died domiciled in Ontario, etc.

Section 4: All such property as aforesaid which is vested in any person, \* \* shall on his death, notwithstanding any testamentary disposition, devolve upon and become vested in his legal personal representatives from time to time, and subject to the payment of his debts; and so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of is hereafter to be distributed.

Section 5 relates to the distribution of the real and personal property of a married woman dying intestate, and section 6 to the right of a father, grandfather and grandmother to the real and personal property of one who dies intestate without leaving issue.

Section 9: Subject as hereinbefore provided, the legal personal representatives from time to time of a deceased person shall have power to dispose of and otherwise deal with all real property vested in them by virtue of the preceding sections of this Act, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were personal property vested in them.

It appears to me that the plainly expressed intention of this legislation is to vest in the legal personal representa-

tives all the real property of the deceased *as if the same were* personal property. The Act does not say it is to devolve upon them so far as it has not been disposed of. They take it absolutely subject to the payment of debts, and debts being satisfied it is to be "distributed" as personal property is distributed, except so far as it is disposed of by deed, will or other effectual disposition. If it has been disposed of by will, the personal representatives, when the debts are paid or if there are no debts, have the bare legal estate for the devisee as the learned Chancellor says in the judgment below.

Judgment.

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OSLER,  
J.A.

The latter is then the beneficial owner, but not having the legal estate he cannot, whether the debts are paid or not, make a good title without a conveyance from that person in whom the legal estate is outstanding. If the debts are paid, or there are no debts, he may compel such conveyance, but the purchaser is entitled to it, as he must have both the legal and beneficial estate to complete his title.

When, therefore, the defendants refused to procure a conveyance from the executor, and tendered a conveyance to which he was not a party as a sufficient conveyance under the contract, and upon the plaintiff's refusal to accept it proceeded to declare the deposit forfeited, and to resell, they took, in my opinion, a course they were not justified in taking. The plaintiff's requisition was well founded, and when the defendants refused to comply with it, while he might have brought an action for specific performance had he desired to do so, yet he was entitled to take the defendants at their word, and treating the contract as being off, as they also do in their statement of defence, to sue for his deposit.

Though I rather agree with the learned Chancellor that the question was one of conveyance and not of title I am not satisfied that Blackburn, executor of H. C. Sheppard, would not have been compelled to convey. The evidence is that there were in fact no debts. There is no absolute rule of law that the executor in such a case is entitled to

Judgment.

OSLER,  
J.A.

prevent the devisee from disposing of the property for a year, for that is what it would come to. Even if it can be said that a devise of real property is now strictly analogous to a bequest of personalty as regards the position of the devisee, yet even in the latter case, there is no absolute rule: Williams on Executors, 8th ed. p. 1250. "I know of no case," said Lord Eldon in *Angerstein v. Martin*, T. & R. at p. 241, "which prevents executors, if they choose, from paying legacies, or handing over the residue within the year, and if it is clear, *currente anno*, that the fund for the payment of debts and legacies is sufficient, there can be no inconvenience in so doing." His Lordship also observed on another occasion that if a case was produced in which it was quite clear that there were no debts the court would give the fund to the party notwithstanding there had not been a lapse of twelve months: *Garthshore v. Charlie*, 10 Ves. at p. 13.

It seems to me as plain as possible that the plaintiff was not in default, and on this ground the appeal should be allowed.

MACLENNAN, J. A. :—

This is an unfortunate case. It is an action by a purchaser against his vendor to recover his deposit. There was a plain and simple contract for the sale of a dwelling-house, upon a sale by auction. The title was about as clear and free from complications as it could be, and yet the result is the sale is off, the vendors, who are executors, have had the expense of two abortive auction sales, a trial at the sittings of the High Court, an appeal to the Divisional Court, and finally the present appeal to this Court.

All this in my opinion might and should have been avoided by a little common sense, a little care and prudence, and a little knowledge of law on both sides. The plaintiff ought to have known that exaggerated statements of the selling value of the property, by the auctioneer, would not avoid the sale; and if he did not know, his solicitor should have informed him, that as against a signed



contract in writing containing a full and accurate description of the land and building, loose descriptive statements by the auctioneer could be of no weight and could not relieve him from its fulfilment. The signed contract shews that the objections on the ground of misrepresentation by the auctioneer were of the most trifling and groundless character; and they were promptly disposed of at the trial.

Judgment.  
MACLENNAN,  
J.A.

The plaintiff puts his right to recover back his deposit which he paid at the time of the sale, on two grounds, the first being the alleged misrepresentations by the auctioneer already mentioned, for which he claimed either a rescission or compensation by means of an abatement of price; and the other that the defendants did not exhibit a good title, and were unable or unwilling to do so, and had declared his deposit forfeited, and had offered the lands for sale again.

The defendants, besides denying the alleged misrepresentations, put their defence on the ground that on the 15th of June they tendered to the plaintiff a deed of the land, but he wrongfully refused to accept it, or to pay the balance of the purchase money, or to complete the purchase. They then go on to say that on or about the 20th of June, they served a notice on the plaintiff of the forfeiture of the deposit, and of their intention to resell the lands and to hold the plaintiff for the deficiency: that they did offer the land for sale, both by auction and privately, but had not succeeded in selling, and they claim to retain the deposit as forfeited.

It is apparent from these pleadings that both parties treat the sale as off. The plaintiff is not to have the land, and it follows *primâ facie* that if he is not to have the land, the defendants should not keep what has been paid as part of the purchase money; that the consideration for which it was paid has failed, and the defendants should not keep the land and the money too.

That is how it would be in the case of a simple contract of sale, which had gone off without the fault of the purchaser, a part of the purchase money having been paid,

Judgment. whether as a deposit or otherwise: Fry on Specific Performance, 2nd ed., p. 614; Dart's Law of Vendors and Purchasers, 6th ed., pp. 220-222.

MACLENNAN,  
J.A.

But in all such cases the rights of the parties depend on the terms of the contract, and it is an illustration of the careless way in which some solicitors are now beginning to draw pleadings, that although the present agreement contains an express stipulation concerning the deposit, it is not referred to either in the statement of claim or in the statement of defence.

The statement of claim says that at the sale the plaintiff purchased at the price of \$2,250, and thereupon paid the defendants \$225 on account of the purchase money, and there is not a word to indicate that it was paid by way of deposit.

The statement of defence states the matter in nearly the same terms, and that the plaintiff paid down ten per cent. of the purchase money at the time of the sale. It is nowhere alleged that it was paid, or that the agreement required it to be paid, as a deposit. It alleges a refusal to pay the balance of the purchase money, and the only reference to the sum paid as being a deposit is in paragraph four where it is said that the defendants served the plaintiff with notice of forfeiture of the *said deposit money*, and of the intention to resell the lands, etc.

The action to recover money paid as purchase money, whether as a deposit, or as one or more instalments, was always in the nature of a common law action to recover back money as for a consideration which had failed, and although it might have been brought in a court of equity, whenever a lien for it was sought to be declared on the vendor's interest in the land, the action was still in its nature a common law demand, and was governed by common law rules and principles: *Howe v. Smith*, 27 Ch. D. at p. 92.

The present action must therefore succeed or fail upon a consideration of the terms of the contract, and the conduct of the parties with reference to it.

[The learned Judge then stated the facts, and continued:] Judgment.

After the making of the contract the plaintiff's solicitors applied themselves at once to investigate the title, and there is no complaint of any want of due diligence in that matter. They received the registrar's abstract on the 2nd of May, and on the very next day sent their requisitions upon the title to the defendant's solicitors, and the enquiries were actively pursued from that time forward. In the absence of any unreasonable delay, therefore, the time named for payment of the balance of the purchase money was not essential, and there was no default in not paying it on the 4th of May, the day named in the contract. This would have been otherwise before the Judicature Act, for the purpose of a legal demand like the present, but that Act now makes the rule which prevailed in equity applicable instead of the different rule which prevailed at law : *Howe v. Smith*, 27 Ch. D. at p. 92. MACLENNAN,  
J.A.

Now what the contract says is that if the purchaser fails to comply with the *conditions aforesaid*, or any of them, the deposit and all other payments shall be forfeited, etc., and the only "conditions aforesaid" were the payment of the deposit, the signing of a contract, the payment of the balance, and the verification of the title at his own expense.

The deposit was paid. The contract was signed. The question arises about the verification of the title, and the only condition, therefore, noncompliance with which could work a forfeiture, is the nonpayment of the balance of purchase money. The contract provides that upon payment of the balance of purchase money the purchaser shall be entitled to the conveyance, and that the vendors are to furnish the deed. The meaning of that I take to be that the vendors are to prepare and procure the execution of a proper conveyance, and that its delivery to the purchaser and the payment of the balance of the purchase money were to be contemporaneous acts. Therefore before the money was properly payable the title had to be investigated, and the conveyance had to be prepared and executed

Judgment. by all proper parties, ready to be delivered at the same time. The equitable rule as to payment of purchase money was considered, with his usual care and accuracy, by the late Chancellor Spragge in *Thompson v. Brunskill*, 7 Gr. 542, in which it was laid down that on a purchase of land, the price of which is payable by instalments, the purchaser may require the vendor to shew a good title before parting with any portion of the purchase money, and that if in such a case an action were brought it would be restrained on payment of the money into Court pending the investigation of the title.

MACLENNAN,  
J.A.

Other cases to the same effect will be found noted at pp. 3398-99 of Robinson and Joseph's Digest.

That, therefore, is the law applicable in the present case, notwithstanding that the 4th of May was named as the day for payment.

[The learned Judge then discussed the evidence, and continued:]

It was the notice, and proceedings taken as threatened therein for a resale, which occasioned the present action, which was commenced on the 3rd of July.

It is now settled that where upon a sale of land, a part of the purchase money is paid, not merely as such, but, as in this case, by way of deposit, the sum so paid serves two purposes; if the purchase is carried out, it is part of the purchase money, but its primary purpose is that it is a guarantee for the fulfilment of the contract: *Howe v. Smith*, 27 Ch. D. 89, and *Soper v. Arnold*, 35 Ch. D. 384; 37 Ch. D. 96; 14 App. Cas. 429. These cases also I think decide that if the sale goes off owing to the default of the purchaser he cannot recover the deposit, whether there is any express provision for its forfeiture in the contract or not. It is a guarantee or security that the purchaser "means business" as expressed, in the case last cited, by Lord Herschell, and it follows that if the transaction fails through the purchaser's fault the seller ought to retain the benefit of his guarantee.

The question, therefore, in this case is, did the sale fall



through by the default of the purchaser? If it did he cannot recover, if not he ought to succeed. Both the learned trial Judge and the Divisional Court decided the case in favour of the defendants, on the ground that the question between the parties was one of title, that a good title had been shewn, and that therefore the plaintiff's refusal to complete was not excused.

Judgment.

MACLENNAN,  
J.A.

With great respect I find myself obliged to come to a different conclusion on the question whether a good title had been shewn. It was conceded in argument that the title is in reality perfectly good, and on the other hand it is also conceded that the vendors could have procured a conveyance from H. C. Sheppard's executor without difficulty. The contract is good and the title is good, and yet both parties treat the sale as off. Both stand on their strict rights, and that being so, I think the plaintiff's default must be established clearly before the defendants can be allowed to keep the plaintiff's money, and the land too. The defence is by way of confession and avoidance, and the onus is on the defendants. It is therefore necessary to examine carefully the contract and the conduct of the parties, in order to determine where the fault lies.

Independently of express provisions in the contract, a purchaser has always a right to a good marketable title: Sugden on Vendors, 14th ed., p. 337. It is the ordinary duty of the vendor to furnish an abstract deducing a good legal and equitable title: *ib.* p. 406. The abstract is sufficient when it shews on its face such documents and facts, that, if the documents are produced and the facts proved, the title is good: *ib.* p. 424. And in another passage, the same learned author says equity considers the abstract complete whenever it appears that upon certain acts done the legal and equitable estates will be in the purchaser: *ib.* p. 423. And finally a good title is shewn when the documents are produced and the facts proved: *ib.* p. 424. Ordinarily, therefore, the duty of the vendor is to furnish a complete abstract, and to produce the documents, and prove the facts mentioned therein, and the examination of

Judgment. the documents and proofs with the abstract in order to  
MACLENNAN, see that the abstract is true in all essential particulars, is  
J.A. what is meant by the verification of the abstract or the  
verification of the title: Dart, 6th ed., p. 470, *et seq.*, and  
see pp. 479 and 480.

The duty of the vendor being as thus stated, it becomes necessary to see how far it is qualified by the special terms of the contract. The only qualification is found in condition four, already quoted. Instead of the complete conveyancer's abstract, he was only bound to furnish a registrar's abstract, which I suppose means the usual registrar's certificate, and he was only to furnish such title deeds as were in his possession, and the purchaser was to verify the title at his own expense, and to be at all further expense arising out of the purchase.

Now what is the effect of the first qualification as to furnishing an abstract? Suppose that it did not shew all that is necessary to indicate a good marketable title in fee simple, as I suppose a registrar's abstract hardly ever does. Is he to be content with such title as it shews, or can he require the vendor to supplement it? I cannot doubt that if the vendor desires to proceed with the sale he must supply whatever defects are pointed out, and the purchaser is not obliged to endeavour to do it himself. If the vendor declines, as he may do by virtue of the stipulation, then the purchaser must be free either to withdraw from the contract, or to endeavour to find out for himself whether the title is good. He is not obliged to accept a defective title, and if the vendor will not take the trouble to supply the defects, the purchaser cannot be blamed for withdrawing. The same observations apply to the stipulation as to furnishing the title deeds. The vendor may refuse under the condition in the contract to stir a step to procure any deeds but those in his possession, but if he do, and those in his possession do not shew a title, I think the purchaser must be free to withdraw, or to search for them himself. The stipulation does not extend to anything but the abstract and the deeds; it does not relieve him from the

obligation to prove any facts necessary to shew his title, but if it did, it would not oblige the purchaser to do it for himself, or to become a defaulter if he did not.

Judgment.  
MACLENNAN,  
J.A.

The other stipulation is as to verifying the title at the purchaser's expense. Before the Conveyancing Act in England the vendor might, under certain circumstances, be obliged to pay some expenses attending the verification of the title, as for example, journeys taken to examine deeds in the possession of persons living at a distance: Sugden, 14th ed., p. 430; Dart, 6th ed., p. 471. That Act throws the expense upon the purchaser. I think the stipulation in this contract does no more, although perhaps the concluding portion of it might entitle the vendor to claim from the purchaser any expense he was put to in connection with the purchase: Sugden, 14th ed., p. 432; Dart, 6th ed., p. 320; *Ex parte Addie's Charity*, 3 Ha. 22. But I think it clear that the stipulation here does not transfer the duty of finding the means of verification from the vendor to the purchaser. What the registrar's certificate did in this case, was to shew title in Herbert C. Sheppard, and a will made by him dated the 23rd of August, 1888, registered on the 16th of April 1889, and it might perhaps be inferred that the will dealt in some way with the land in question. The probate of that will, however, was produced, and so also was the probate of the will of Catherine Brooks Sheppard, but neither by the registrar's certificate or otherwise was there any indication of a conveyance from the executors of Herbert C. Sheppard to Catherine Brooks Sheppard or to the defendants, her executors.

Looking at the will of Herbert C. Sheppard and the probate thereof, and having regard to the date of the death, it was clear that by the Devolution of Estates Act, R. S. O. (1887,) ch. 108, sec. 4, the land in question devolved at his death upon his executor, Arthur Robert Blackburn, subject to the payment of the testator's debts; and by section 9, the executor had the same power to dispose of and otherwise deal with it, with all the like incidents, but subject to all

Judgment.  
MACLENNAN  
J.A.

the like rights, equities, and obligations, as if the same were personal property vested in him. Independently of the last mentioned section, *Corser v. Cartwright*, L. R. 7 H. L. 731, decided that an executor to whom an estate is devised, charged with the payment of debts, can confer a valid title on a *bond fide* purchaser or mortgagee, who is not bound to enquire whether there are debts or whether they have been paid. The will of H. C. Sheppard, therefore, and his death in 1889, shewed the title in a person who might have made a valid sale or mortgage of the land; who, if he had not already done so, might yet do so at any moment, and whose duty indeed it might be to sell or mortgage for the payment of his testator's debts. Against such a conveyance or mortgage, a conveyance from the vendors would not avail, nor would even priority of registration be of any service. Nothing could put an end to that state of things, that is, prevent the possibility of the total defeat of the vendors' equitable title, but a conveyance from the executor. If such a conveyance had been produced, unless it had been one upon a sale for valuable consideration, the question of the testator's debts would still remain, for a mere formal conveyance by way of assenting to the specific devise, would be subject to the charge imposed by the statute.

In my judgment, it is impossible to say that in these circumstances a good title was shewn. It is too clear for argument.

Then the purchaser made a requisition. He said "The lands of H. C. Sheppard vested in his executor, required a conveyance from his executor." The answer returned was, that they did not see what the executor had to do with the property. The requisition is insisted on, and the same answer is twice returned; and as neither would give way, the sale was broken off. The defendant's solicitor says in his evidence, that he did not take into consideration at the time the effect of the Devolution of Estates Act; but the plaintiff ought not to suffer for that. The objection was taken as plainly as possible, without actually



mentioning the Act, and it is marvellous that the solicitor should have forgotten it. The surprise is increased when the answer is repeated on two different occasions in language of their own, but in nearly the same terms, by his Toronto agents. It would have been the easiest thing in the world to have said that there were no debts, or that the debts were all paid, which is now said to have been the fact; and that the executor was therefore a bare trustee, and willing or compellable to convey. The solicitor must have known full well how the facts were, because he is the person to whom, by the advertisement of sale, which is made part of the contract, persons are referred for further information about the property. On the other hand the purchaser could himself have enquired, if he was anxious to complete, and could have found out from the executor himself whether there were debts and whether he was willing to convey. The conduct of the solicitors on the one side and the other in omitting to do things which seem obvious enough, and which would have prevented this lengthened and expensive litigation, is apt to suggest motives, but with these we have nothing to do. If the objection made by the plaintiff was good, we must give effect to it even if it was made for the very purpose of bringing about a failure in the sale: Dart, 6th ed., p. 495.

The learned Chancellor thinks that the purchaser was bound to enquire whether the debts were paid, meaning as I take it, to enquire of the executor. I am, with great respect, unable for the reasons I have already expressed to come to that conclusion, and so I think the vendors were in default in not answering, as they might and ought to have done, a reasonable and proper requisition which was necessary in order to shew a good title, and that no blame rests legally on the plaintiff for the failure of the sale. Even if the conveyance which it was the duty of the vendors upon the terms of the contract to prepare and deliver, had been executed by the executor, the enquiry as to debts of H. C. Sheppard would still have had to be made, in order to make the purchaser

Judgment.

MACLENNAN,  
J. A.

Judgment. safe, or else the purchase money would have had to be  
MACLENNAN, paid to him as the actual vendor.  
J.A.

As I have said, the plaintiff's objection on the ground of misrepresentation was dismissed at the trial. He did not before action seek to avoid the contract on that ground but offered to complete upon getting a good title, claiming compensation. I do not think that unfounded claim prevents him from recovering his deposit. If the title had been clear and a proper deed had been tendered the plaintiff would then have been put completely in the wrong; but having made one good objection that is not rendered ineffectual by his also putting forward a bad one.

I think the appeal must be allowed with costs, but by reason of the unfounded charges of misrepresentation the appellant should have no costs up to the hearing.

HAGARTY, C. J. O., and BURTON, J. A., concurred.

*Appeal allowed with costs.*

See 54 Vic. ch. 18 (O.)

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## IN RE LONG POINT COMPANY V. ANDERSON.

*Prohibition—Division Court— Error in law.*

Prohibition will not lie to a Division Court merely because the Judge has erred in his construction of a statute, where he does not by this error in construction give himself jurisdiction he does not in law possess. Judgment of the Queen's Bench Division, 19 O. R. 487, reversed.

THIS was an appeal by the plaintiffs from the judgment Statement. of the Queen's Bench Division, reported 19 O. R. 487, allowing a motion for prohibition to the Fifth Division Court of the county of Norfolk after judgment for the plaintiffs for \$15 damages for killing a deer, on the ground that the right or title to a corporeal or incorporeal hereditament was in question.

The plaintiffs were incorporated by 29 & 30 Vic. ch. 122, and were thereby authorized to carry on the business of "pursuing, protecting and granting licenses to take game, muskrats, mink, otter, beaver and fish" upon their lands and property to be acquired by them on Long Point, in Lake Erie.

The island of Long Point, in Lake Erie, is about thirty miles long and of varying width. One end is separated from the main land by a narrow channel, and the other end stretches far out into the lake. It contains upwards of 20,000 acres, and in 1874 it was all owned by the plaintiffs, except two parcels of about 200 acres each, owned by the government, one at each extremity of the island, and another parcel of 360 acres, which was owned as tenants in common by the plaintiffs and the defendant—the plaintiffs owning three undivided shares, and the defendant one undivided share in fee simple. There was not at that time, nor at any time since then, any fences separating the parcels of the several owners as above mentioned from each other.

The plaintiffs in 1874 imported fifteen deer and placed them upon their own land upon the island with the desire to breed and preserve them. They were turned loose and

Statement. allowed to run at large, and there were then no other deer upon the island. In the year 1881 the defendant placed four deer, some of each sex, upon his lands, that is, upon the 360 acres which were then owned by the plaintiffs and himself as tenants in common, and he did this knowing of the deer which had been placed on the island by the plaintiffs in 1874. In the year 1885 the 360 acres owned in common were partitioned between the plaintiffs and the defendant, and the plaintiffs from that time owned 270 acres and the defendant 90 acres thereof in severalty.

The deer greatly increased in numbers, and they roamed at large over the whole island.

The defendant killed a deer upon his own lands, and the plaintiffs brought this action against him for damages, and upon these facts, which were all admitted by the parties upon the trial before the learned Judge of the Division Court, he gave judgment for the plaintiffs for \$15, holding that under R. S. O. (1887) ch. 221, sec. 10, the property in the deer was in the plaintiffs, no matter where killed.

The defendant applied for prohibition on the ground that the title to land and to an incorporeal hereditament came in question, and the motion was heard by MACLENNAN, J. A., sitting for GALT, C. J., in Chambers, and was refused. His decision was, however, reversed by the Divisional Court, and the plaintiffs appealed, the appeal coming on to be heard before this Court [HAGARTY, C. J. O., BURTON, and OSLER, JJ. A. and MEREDITH, J.] on the 8th of April, 1891.

*McCarthy*, Q. C., and *W. M. Douglas*, for the appellants. The jurisdiction does not depend upon the interpretation put upon R. S. O. (1887), ch. 221, sec. 10, and even if the learned Judge's construction of the latter section were wrong, prohibition would not lie. He did not give himself jurisdiction by any erroneous construction: *Elston v. Rose*, L. R. 4 Q. B. 4; *Regina v. Judge of County Court of Lincolnshire*, 20 Q. B. D. 167; *Siddall*



v. *Gibson*, 17 U. C. R. 98. No right or title to a corporeal, or incorporeal hereditament, or right to a franchise comes in question in this action, as the appellants do not deny the respondent's right to shoot game on his own lands, but they say that he cannot shoot deer belonging to the appellants, or that have been imported by the appellants with a desire to breed and preserve them on their own lands. It was incumbent on the respondent to shew affirmatively that the deer shot were the ones put on the island by him in 1881, for by his own act, in mixing his deer with those of the appellants, he has caused a confusion of property, and he cannot make himself a joint owner with the appellants, without their consent, of all the deer on the island. Argument.

*C. E. Barber*, for the respondent. The effect of the judgment of the learned Judge of the Division Court was to deprive the defendant of an incorporeal hereditament in his land, viz., the right to shoot game, and consequently a right to an incorporeal hereditament came in question in the action, and the Court had no jurisdiction to entertain the action: R. S. O. (1887) ch. 51, sec. 69. Then, too, the title to land came in question, and where, in matters of tort relating to personal chattels, the title to lands is brought in question, though incidentally, the Court has no jurisdiction: *Trainor v. Holcombe*, 7 U. C. R. 548; *Tinniswood v. Pattison*, 3 C. B. 243; *Reynolds v. Offitt*, 3 U. C. L. J. 169; *Chew v. Holroyd*, 8 Exch. 249; *Re Johnson v. Therrien*, 12 P. R. 442; *Re McLeod v. Emigh*, 12 P. R. 450; *In re Adey v. Trinity House*, 17 Jur. 489. The plaintiffs, in order to recover, must claim under their charter; a question of franchise therefore arises which the Court cannot try: R. S. O. (1887) ch. 51, sec. 69.

*McCarthy*, Q. C., in reply.

Judgment. May 12th, 1891. HAGARTY, C. J. O. :—

HAGARTY,  
C.J.O.

No attempt was made to prove any particular property in the animal, or that the defendant had any knowledge or reason to believe that the deer was the plaintiffs' property, or the offspring of their imported herd, and not one of his own.

All the facts as to ownership of the real property were fully admitted, and no question as to right or franchise was involved.

We are not called on to discuss the merits of the case as on an appeal, but merely whether prohibition could issue on the ground of want of jurisdiction.

I think the Judge had the right to try a claim for \$15, the value of an animal wild or tame, said to be the plaintiffs' property, and which the defendant insisted was his property.

I cannot look upon it as being the case of "a judge giving himself jurisdiction by construing an Act of Parliament or a document wrongly."

We may admit to the fullest extent that if the jurisdiction is founded on a statute, as in *Elston v. Rose*, L. R. 4 Q. B. 4, confined to cases of premises under a named annual value, that a judge cannot give himself the right to try by wrongly deciding that the value is to be ascertained in a manner not authorized by the Act.

The case is wholly beyond his right to entertain unless the value be as the statute provides. But in a case which is primarily within his jurisdiction, as here, for the value of an animal belonging to the plaintiffs killed by the defendant, his jurisdiction may be afterwards ousted by some question arising necessary for his decision, which he has no jurisdiction to try.

I do not see that any such question has arisen here : *Regina v. Judge of County Court of Lincolnshire*, 20 Q. B. D. 167. The trustees under a will were directed in their discretion to pay over the income of a fund to the debtor Grills. The County Judge made an order appointing a receiver, and ordered the trustees to pay over to him the interest of the fund until the judgment was satisfied.

The Judge put a wrong construction on the will, the Court holding that the payment was discretionary. They granted prohibition on the application of the trustees who were no parties to the original suit ; holding that the order was interlocutory and that there was no appeal ; that the will in no way made the trustees liable, and therefore that there was no jurisdiction. The short principle is that a judge cannot give himself jurisdiction by construing an Act of Parliament wrongly. But of course this must be when the jurisdiction depends on the statute or document. If it referred to every document, then, as my brother OSLER suggested, any misconstruction of a bargain or contract for the delivery of grain or goods, or for work, produced in an ordinary suit for damages or wages, etc., etc., would be ground for prohibition.

Judgment.

HAGARTY,  
C.J.O.

Mr. Justice Hawkins puts it that the Judge could "make an order appointing a receiver of funds of which the defendant himself had the right to the control or which he had the right to receive, but that is not the order which has been made in the present case, for this order authorizes the receiver to take that which the trustees alone have power to receive and deal with in their discretion."

In fact it was an order on persons not parties to the suit and in no way bound to do as ordered.

In *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, it is said (p. 443) "that the objection that the Judge has erroneously found a fact which though essential to the validity of his order, he was competent to try, assumes that, having general jurisdiction over the subject matter he properly entered upon the enquiry, but miscarried in the course of it. \* \* The question is whether the inferior Court had jurisdiction to enter upon the enquiry and not whether there has been miscarriage in the course of the enquiry."

Of course there may be cases where the enquiry is *primâ facie* within the jurisdiction but facts may appear shewing the absence of jurisdiction which the Court is incompetent to try.

Judgment.

HAGARTY,  
C.J.O.

I base my judgment solely on the ground that on the facts agreed on in writing by the parties there was full jurisdiction in the Court to try the case, and that whether the Judge has or has not misconstrued the statute, no such misconstruction has given him jurisdiction or ousted his jurisdiction.

I see nothing here raising, on the admitted facts, any objection to the jurisdiction such as a misreading of the statute, or any finding by which jurisdiction was given or grounded.

I regret that we must set aside the order for prohibition, as I am unable to understand why the defendant was held liable. He had the same right to import deer and place them on his own land, as the plaintiffs had on their land. I do not see how he can be said to have mixed the herd with the plaintiffs'—beyond the inevitable mixture where neither party had any fences—and there was no proof whatever that the animal killed on the defendant's land belonged to one herd more than to the other.

BURTON, J. A. :—

I am of opinion that the judgment of the Divisional Court is wrong, and should be reversed and the order for a writ of prohibition refused.

There is no conflict of testimony here as to the facts, and no right or title to any corporeal or incorporeal hereditament came in question.

In that state of things the learned County Court Judge had a clear jurisdiction to enter upon the enquiry, and whether the conclusion he arrived at upon the trial was a correct one or not, we are not now concerned with. There being no appeal, it may be that the defendant is without remedy, if the decision be erroneous; but we certainly cannot assume the power to retry a question which the County Court Judge was competent to decide.

I quite agree that if, as in the case of *Elston v. Rose*, L. R. 4 Q. B. 4, the learned Judge had *given himself juris-*



*diction* by coming to an erroneous conclusion upon a point of law upon which the limit to his jurisdiction depended, then in point of fact he would have had no jurisdiction and no authority to entertain the action, and a writ of prohibition in such a case would have been properly awarded ; but that is not the case here. He had, I think, a clear jurisdiction to try the case, although possibly he may have come to an erroneous conclusion upon the law ; as to which I express no opinion, but having jurisdiction, his decision either upon a question of fact or a question of law, would be conclusive until reversed upon appeal.

Judgment.

BUTON,  
J.A.

There might be much force in the argument of the respondent's counsel if in the course of the trial a *bond fide* dispute had arisen as to his client's right to shoot game upon his own land, but no such question was raised there, but the dispute was confined apparently to the question of the property of the company in this deer.

I think therefore that my brother MACLENNAN's judgment should be restored and the appeal allowed.

OSLER, J. A. :—

I do not dissent from the judgment which I understand the other members of the Court are prepared to give, although on the assumption that the learned Division Court Judge placed a wrong construction upon the R. S. O. (1887) ch. 221, sec. 10, I am not so clear that prohibition was not properly granted for the reason I will presently mention. I do not for a moment suppose that, as was argued at the bar, and said to have been accepted in other cases as the result of their decision, the Queen's Bench Division meant to lay it down that prohibition lies merely because the Judge places a wrong construction upon a document, or a statute, or otherwise comes to a wrong conclusion in law upon admitted facts in a cause or matter within his jurisdiction. He cannot give himself jurisdiction by doing so, but that is an entirely different thing.

Judgment.

OSLER,  
J.A.

In a matter within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other Judge: *Siddall v. Gibson*, 17 U. C. R. 98.

The law is accurately stated by ARMOUR, J., in *Bland v. Andrews*, 45 U. C. R. 431, at p. 437, where it is said: "The learned Judge of the Division Court had jurisdiction to determine whether the garnishee was indebted to the primary debtor and whether such debt was a debt attachable under the provisions and within the meaning of the Division Courts Act, and it is no ground for a prohibition that he came to a wrong conclusion of law in a matter within his jurisdiction." Cp. *Re Macfie v. Hutchinson*, 12 P. R. 167. See also *Re Field v. Rice*, 20 O. R. 309.

It may be that in the course of the cause something may come in question which would oust the jurisdiction, as for example, the title to land or the right or title to some corporeal or incorporeal hereditament, or a franchise, etc. In such cases jurisdiction cannot be maintained by deciding as a question of law upon admitted facts or the construction of a document or statute that the matter upon which jurisdiction depends does not come in question; and the same as regards entertaining or deciding the cause or matter in the first instance where the right to do so depends upon the existence of some preliminary condition: *Ahrens v. McGilligat*, 23 C. P. 171; *Westover v. Turner*, 26 C. P. 510; *Elston v. Rose*, L. R. 4 Q. B. 4; *In re Evans v. Sutton*, 8 P. R. 367.

It is otherwise where the jurisdiction depends upon the determination of a question of fact. "If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction the Court will not interfere except upon very strong grounds:" *In re Bowen*, 21 L. J. Q. B. 10, 15 Jur. 1196; *Brown v. Cocking*, L. R. 3 Q. B. 672; *Re Bushell v. Moss*, 11 P. R. 252. In *Enraght v. Lord Penzance*, 7 App. Cas. 240, it is said by Lord Blackburn (at p. 250): "I think that this was not exactly a question of

fact, but of law and fact combined, within the jurisdiction of the judge ; and consequently that even if he was wrong in his decision, it would afford no ground for prohibition.”

The question was discussed in the recent case of *In re Chisholm v. Oakville*, 12 A. R. 225, where the leading case of *Colonial Bank of Australasia v. Willan*, L. R. 5 P. C. 417, and other authorities, are cited, and in which different classes of cases in which prohibition lies are noticed. I refer also to *In re Padstow Total Loss and Collision Assurance Association*, 20 Ch. D. 137, at p. 145.

The case of *The Queen v. Judge of the County Court of Lincoln*, 20 Q. B. D. 167, goes no further than *Elston v. Rose*, L. R. 4 Q. B. 4, as the illustration put by Pollock, B., in the passage cited in the judgment below shews. What the County Judge had done was to make an order for a receiver in the action, after judgment against the defendants, and to direct the trustees under a will in which the defendant was interested, but who were not parties to the action, to pay certain funds to the receiver. “The County Court Judge came to the conclusion on the construction of the will, that the words of that will gave him jurisdiction to make this order not only as against the defendant in the action but also as against the trustees.” There was a plain case of assuming jurisdiction by a wrong construction of the will.

If the real question raised in the action in the Court below was the right of the defendant to kill and take animals *feræ naturæ* found on his own land—the right to take and kill *ratione soli*—that being clearly a right or title to an incorporeal hereditament: *Blades v. Higgs*, 12 C. B. N. S. 501, 11 H. L. C. 621; *Regina v. Battle Union*, L. R. 2 Q. B. 8; *Hooper v. Clark*, *ib.* 200, then I should have been disposed to say that, subject to the determination of the question of fact whether the deer were *feræ naturæ*, the jurisdiction was ousted by reason of such right being in question, though the action had been, as it undoubtedly was, in all respects up to that moment within the jurisdiction. The Judge might have decided as a question of fact whether the deer had been reclaimed, and if so, being no

Judgment.

OSLER,  
J.A.

Judgment.  
OSLER,  
J.A.

longer *feræ naturæ*, the right would not have been in question, nor the jurisdiction ousted. If, however, he assumed to decide that as a question of law upon the construction of the statute, the case might well be looked upon as one in which he was giving himself jurisdiction or proceeding in excess of his jurisdiction by having so decided upon a misconstruction of the Act, if he really did misconstrue it, upon which in the view I am taking of the case I offer no opinion.

On the other hand, if the real question in the action is taken to be whether the particular deer, having been, as the Judge held as a fact, bred and preserved by the plaintiffs, were their property and not the property of the defendant, whose general right to take and kill wild deer *ratione soli* was not brought in question, then the construction and application of the Act as regards deer so bred and preserved, may be said to have been within the jurisdiction of the Judge; and be his decision right or wrong, it would not be a case for prohibition.

I am not altogether satisfied that this is the proper way of stating the question; and if the case depended upon my opinion, I should, I think, state it differently. But I should then find it necessary to consider whether the Divisional Court was right in holding that the Judge of the Division Court had misconstrued the Act.

MEREDITH, J.:—

The suit in the Division Court was for trespass to goods: the claim one which, unquestionably, that Court was quite competent to try.

The defence was that the goods were not the property of plaintiffs; that they were the property of the defendant Anderson, or if not, were animals *feræ naturæ* which the defendant might and did lawfully kill and take for his own use upon his land.

Whether the deer were the goods of the plaintiffs or of the defendant Anderson, or whether they were animals



*feræ naturæ* were the only questions for determination, and they were determined, after a trial and careful consideration of the case, in the plaintiffs' favour. Judgment.  
MEREDITH, J.

I am unable to perceive how the jurisdiction of the Division Court was altogether ousted; how any question of "right or title to any corporeal or incorporeal hereditaments" necessarily came in question.

The defendant Anderson's title to his land, and all rights incident to the ownership of it, were and are admitted, including the right to kill and take such wild animals as might be found upon it. It was never denied, and is not, that if the deer were animals *feræ naturæ* the plaintiffs must fail. It was determined that they were not; and that they were the deer of the plaintiffs, not those of the defendant Anderson. It was open to the learned Judge in the Division Court to find the former as a matter of fact, he however preferred to put his finding upon the provisions of the statute, which he considered took the deer out of the category of animals *feræ naturæ*.

I apprehend that if the deer were not the property of the plaintiffs, and were not shot upon their land, they could not recover; that nothing turns upon the ownership of the lands upon which they were killed: that if shot any where else, not on the plaintiffs' land, the defence would be quite as complete as it now is, the deer having been killed on Anderson's land.

It has long been too firmly settled in this Province to be now disturbed even by this Court, that, however wrong in fact or law the determination of the inferior court may be, prohibition will not lie if the matter be within its jurisdiction. The error which may occasionally be without a remedy in consequence of this is shewn in the familiar case of *Siddall v. Gibson*, 17 U. C. R. 98. As to matter of law the rule is given in *Bland v. Andrews*, 45 U. C. R., at p. 437, by ARMOUR, J., in these words: "It is no ground for a prohibition that (the Judge of the Division Court) came to a wrong conclusion of law in a matter within his jurisdiction."

So also if the question of jurisdiction depend upon contested facts prohibition should not go if the inferior court

Judgment. were competent to try them, even though the superior court held them wrongly determined, so long as the inferior court's decision was not perverse, but the result of an honest exercise of judgment upon the evidence.

MEREDITH, J.

Assuming, for the purpose of argument, the right to the dead deer in question to have been "a right or title to any corporeal or incorporeal hereditament;" and also, the question to have been whether or not the Acts in question, or either of them, deprived the defendant Anderson of this right, it might well be contended that as to that part of the case prohibition would lie; not because the inferior court was conferring jurisdiction upon itself by a wrong interpretation of an Act, but because, whichever way that question were determined, there would be a trial and determination of a question of "right or title to a corporeal or incorporeal hereditament;" but prohibition should go only to that extent, it ought not to interfere with the trial and determination of the case upon the other questions admittedly within the jurisdiction; and the defendant, having permitted the case to be tried and determined as it was, should not be allowed now to say that, because of some view of the case—even if the view of it upon which it was determined—there was no jurisdiction, and he is entitled to the prohibition sought, so long as there are other questions and other views of it in which there was admittedly jurisdiction, and they have not been determined against the plaintiffs. In such a case, in my opinion, the defendant should, if the inferior court refused to give effect to his objection, move to prohibit further proceedings upon that branch of the case.

The Division Court Judge expressly denies that he has dealt with the case upon any question of right or title to or affecting lands. He holds, that if not tame in fact—without deciding that question—by statute, a property in the deer in question was given to the plaintiffs; that the deer by reason of the Act are not animals *feræ naturæ*.

And is it so plain that this is not so? If section 10 of ch. 221, R. S. O. (1887), (apparently first introduced into the laws respecting game in Ontario in 1865), give the right only to the owner of the land upon which the gam

may be, what was the object in passing it? Do not the cases referred to in the judgment of the Divisional Court and *Beatty v. Davis*, 20 O. R. 373, show that such owner at common law had all that even as to game altogether wild? See also *Smith v. Andrews*, (1891) 2 Ch. 678.

If the view of the Divisional Court be the true one how does the Act receive such "fair, large and liberal construction and interpretation as will best secure the attainment of its object?" What great encouragement is it to persons desiring to breed and preserve game?

If the defendants were prosecuted for an infraction of the game laws, would it oust the jurisdiction of the inferior court to urge that, as owners of land, they had the common law right to shoot game, and shot it, upon such land?

And if the question were, upon whose land was the deer killed—the boundaries not being, but the place of killing being, in question—would there not be jurisdiction in the Division Court?

And is it so clear that the plaintiffs' deer are as a matter of fact animals *feræ naturæ*, not reclaimed? Have they so manifestly "resumed their ancient wildness, and are found at large?" I should have thought not. See Blackstone's Com., 21st ed., vol 2, p. 393.

In my judgment the order for prohibition *here* should have been granted only if it were held that the question whether the deer killed were wild or tame raised a question of "right or title to a corporeal or incorporeal hereditament;" that is to say, that when a *bonâ fide* claim that the deer were animals *feræ naturæ*—it being admitted that they were killed on the defendant Anderson's land—was raised, such right or title was involved; but that was not even contended for.

See *Hooper v. Clark*, L. R. 2 Q. B. 200; *Wickham v. Hawker*, 7 M. & W. 63; *Webber v. Lee*, 9 Q. B. D. 315; Challis on Real Property, p. 40, (n).

The plaintiffs do not claim the deer as part of their land or in any way connected with it, but simply as goods; and so too with the defendant, so far as the question whether the deer shot were of those put there by the plaintiffs or

Judgment. the defendant Anderson goes. If it were and could have  
MEREDITH, J been claimed on either side that the deer in question were  
part of the inheritance a very different question would  
have arisen and would require different consideration.

I refer to *Graham v. Spettigue*, 12 A. R. 261; *In re English v. Mulholland*, 9 P. R. 145; *In re Bradshaw v. Duffy*, 4 P. R. 50; *Bank of Montreal v. Gilchrist*, 6 A. R. 659; *In re Birch*, 15 C. B. 743; *In re McKenzie v. Ryan*, 6 P. R. 323; *O'Brien v. Irving*, 7 P. R. 308. See also *Re Sims v. Kelly*, 20 O. R. 291, and *Re Rice v. Field, ib.*, 309.

I am not disposed to look upon the result of a refusal of prohibition as working the gross injustice or hardship, from a moral point of view, to the respondent, urged in his behalf. It is fair to point out, in answer to such appeals, that he took his chances of obtaining a judgment of an inferior Court in his favour, upon the very point, before seeking to prohibit it from trying it for want of jurisdiction: See *Regina v. Essery*, 7 P. R. 280; *Moore v. Gamgee*, 25 Q. B. D. 244; and *Broad v. Perkins*, 21 Q. B. D. 533. Nor can I think it so difficult, as was urged for this respondent, if he really desire it, to devise some means by which he can have the questions involved litigated in the High Court; indeed it was at the same time contended that they had been determined in his favour in the Common Pleas Division.

Nor can I look upon the respondent in the Naboth-like light in which he has been presented: from the facts shewn in the appeal book I would gather, rather, that by reason of his ownership of his comparatively very few acres of this large island, he is seeking to obtain an advantage which morally, if not in law, he is not entitled to, to take that which morally, if not in law, belongs to the plaintiffs; without fairly contributing, to reap the benefits of the plaintiffs' care, labour and expense.

I would allow this appeal, reversing the judgment and setting aside the order of the Queen's Bench Divisional Court, and restoring the order of the Judge in Chambers dismissing the motion for prohibition, with costs.

*Appeal allowed with costs.*



BRANTFORD, WATERLOO AND LAKE ERIE RAILWAY  
COMPANY V. HUFFMAN.*Bond—Condition—Breach—Damages.*

The defendant in response to an advertisement by the plaintiffs sent in a tender for the construction of certain works. His tender was defective because not executed by sureties and not accompanied by a deposit. It was not accepted, but negotiations took place between the plaintiffs and the defendant in connection with it, and the defendant signed a bond conditioned within four days to furnish the sureties and make the deposit and execute all proper and necessary agreements for the doing of the work in question. The terms of the contract had not been settled between the parties. The defendant did not within four days furnish sureties or make a deposit or sign any agreement and no agreements were within that time made between the parties, or tendered to the defendant for execution :—

*Held*, [BURTON, J. A., dissenting], that as the terms of the contract had not been settled between the parties, there was no default on the part of the defendant of which the plaintiffs could complain, and no liability for damages.

Judgment of ARMOUR, C. J., affirmed.

THIS was an appeal by the plaintiffs from the judgment Statement. of ARMOUR, C. J., and came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 14th of February, 1890.

*S. H. Blake*, Q. C., and *F. Mackelcan*, Q. C., for the appellants.

*Osler*, Q. C., and *Harley*, for the respondent.

May 13th, 1890. OSLER, J. A. :—

The plaintiffs sue upon a bond, assigning breaches of the condition.

The statement of claim sets forth in substance that the defendant tendered for the construction of part of the Brantford and Waterloo line of railway : that the plaintiffs accepted the tender, and were ready and willing and offered to do all things necessary on their part to carry out the contract contemplated by the tender, and that the defen-

Judgment.

OSLER,  
J.A.

dant on the 22nd of January, 1889, acquiesced in such acceptance, and executed the bond bearing that date. The bond set forth is in the penal sum of \$5,000, reciting the tender and conditioned to be void if the defendant "to secure the completion of the said railway shall within four days from the date thereof furnish two acceptable sureties to the company, and deposit to the credit of the company in the Bank of Montreal, at Brantford, five per cent. of the amount of his tender, and execute all proper and necessary agreements for the construction and completion of the railway by the 15th of September next, and the commencement of the road by the 4th of February next, and the continuous prosecution thereof thereafter till completed," etc.

The breach alleged is that defendant, notwithstanding his said obligation, did not within four days from the date of the bond furnish the acceptable securities, nor deposit the five per cent. of the amount of his tender, "nor did he, although requested so to do, execute and complete all proper and necessary agreements" for the construction and completion of the railway by the 15th of September, 1889, nor did he commence the construction of the road by the 4th of February, but on the contrary absolutely refused to perform the condition, etc., whereby the plaintiffs were compelled to relet the said contract, and to employ other persons to execute the works at a larger price, etc.

The defendant denied that the plaintiffs had accepted his tender, or entered into any contract with him, and denied the breaches assigned, and alleged that if there was any breach of condition the plaintiffs had sustained no damage by reason thereof.

The learned Chief Justice dismissed the action; but before mentioning the grounds on which he did so, it will be convenient to refer briefly to the evidence.

It appeared that the plaintiffs had advertised for tenders for the construction of that part of their line between Brantford and Waterloo to be sent in up to noon of the 22nd of January, 1889. The advertisement stated that plans and specifications were to be seen, and other information obtained, at the office of the company.

At the end of the paper on which the specifications were printed was a series of paragraphs headed "General Conditions of Contract," the last two of which are as follows:

6. Forfeit—For the due *fulfilment of the contract*, satisfactory security will be required by the deposit of money or marked cheque to the amount of \$5,000, payable to the order of the company.

8. Tenders will not be considered unless made strictly in accordance with the printed forms, and to each tender must be attached the actual signatures of two responsible and solvent persons, residents of the Dominion, willing to become securities for the carrying out of these conditions, and the due performance of the works embraced in the contract.

On the 22nd of January, 1889, the defendant sent in a tender on a form supplied by the company, "for the construction of the work \* \* within the time and upon the terms and conditions stipulated in the specifications, bearing date, at the rates given herewith, which rates applied to the approximate quantities given in the bill of works, amount in the aggregate to the sum of \$138,568.

"And further agree that all additions to and alterations and omissions in the work contracted for, shall be valued and added to, or deducted from, the above mentioned amount, as the case may require, according to the several prices set opposite to each description of work in the following schedule and according to the special provisions of the specifications; and the amount so altered shall be considered and settled as the amount of the contract."

Then followed a schedule of the bill of works with approximate quantities and prices. The tender was signed by the defendant, but was not accompanied by the names of sureties for the due performance of the work.

There is nothing in the specifications or the general conditions as to the time for the commencement or completion of the works.

Notwithstanding the omission of the names of the

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

sureties the plaintiffs considered the defendant's tender, which was the lowest of some twenty, which had been sent in up to the 22nd of January, and the directors thereupon passed the following resolution :

January 22, 1889.

That the contract for the Brantford, Waterloo, and Lake Erie Railway be awarded to Mr. Paul Huffman upon his depositing five per cent. as security for the completion of the work in the Bank of Montreal in this city, and furnishing satisfactory sureties, and also entering into a proper agreement satisfactory to this board of directors, and that the secretary notify Mr. Huffman to this effect.—Carried.

At the same meeting a further resolution was passed, directing the secretary to notify seven of the other tenderers that the board "was considering their tenders," and a committee was appointed to meet and confer with the defendant, to whom a notice was sent in the following terms :

Brantford, January 22nd, 1889.

Dear Sir,—I beg to notify you that on furnishing two acceptable securities, and five per cent. cash deposit receipt in the Bank of Montreal, this city, and completing the proper agreements with our Board, the contract will be awarded to you as per your tender submitted this day.

(Signed) J. J. HAWKINS, Secretary.

In the evening of the same day a meeting took place between the defendant and the president and directors' solicitor, and other officers of the plaintiffs, at which the bond, the subject of this action, was given. What took place at this meeting may be sufficiently gathered from the evidence of Wilkes, Henry, and Elliott, three of the directors. The defendant's understanding of the object of the bond, and of what was expected from him need not be referred to at present.

*Wilkes* swore :

"Q. What took place on that occasion? A. The defendant was asked whether his sureties were ready. We



asked him whether he was prepared to close the contract ; he said no, he would require a few days. We said we could not wait ; and we wanted to close with him before the time passed, and bind him in some way. It was talked over how that should be done, and after discussing, it was decided to draw a bond.

Judgment.

OSLER,  
J.A.

Q. State how it was he came to sign it? A. We were anxious to close the matter ; if he did not close that night we did not know how long the whole matter might remain open. The pressure we brought to bear was more to fix the contract, it was not damages we were after ; it was to fix the contract on him, and on his future sureties ; to settle the matter so that the road might proceed at once. He did not seem to object to anything, he did not find fault, he did not urge us especially for time, only this few days. He did not say he could not do it ; he seemed pleased with the contract and would get his traps and go right on with it ; that was the tenor of his conversation.

Q. What did the defendant do after this to your knowledge in regard to this matter ? A. He went directly the next morning to Toronto, I understand ; he told us he was going.

Q. For what purpose ? A. To see his sureties, I understood him.

Q. Do you know whether he went ; did he tell you anything about it afterwards ? A. I read his evidence which shows he did go."

In cross-examination :

"Q. Was there any intention to alter the position of the contracting parties on that evening of the 22nd of January beyond the tender and this acceptance ? Was there any intention to alter the position of the parties ? A. I don't think so.

Q. Then the view you had was that the document you were calling for was one you had the right to call for in the position the matter was in ? A. Yes.

Q. And that the defendant in executing it was only executing what he was entitled in law to execute ? A. I suppose so."

Judgment.

OSLER,  
J.A.

And in re-examination :

“ Q. Was this, so far as he was concerned, a matter of obligation or a matter of choice, the execution of this bond? How was it put to him? A. That he might perhaps lose it if he did not sign it.

Q. That he might perhaps lose the contract if he did not sign the bond? A. Yes; I cannot tell you what he thought about the matter. My impression may have been different from that of the defendant. He made no objection to signing the bond, except as to time. He seemed to be perfectly clear that he had the contract.”

*Henry*, speaking of the same occasion, says :

“ When we met in Wilson’s office we wanted him to enter into a contract or make a binding memorandum. Afterwards it was decided the only way in which it could be done was in the shape in which it was done, to draw a bond for the faithful performance of the contract.”

*Elliott*, swore :

“ I think I suggested to Mr. Wilson, that the committee had come for the purpose of having an agreement drawn up, binding the defendant in his contract with the plaintiff; Mr. Wilson said it was too late, that an agreement could not be drawn that night; I said a bond could be drawn for the agreement, and, after consulting with the others, and with the president, Mr. Wilson proceeded to draw the bond. After drawing part of the bond, some remarks were made about what was in it, and Mr. Wilson read that part; he went on and completed the bond, and then read it over again; then, turning to the plaintiff, he said : ‘ I will read this through so you will thoroughly understand it ’ ; he read it over, and the defendant signed it.”

It is clear that at this time the defendant had made no arrangement with any one to become surety for him, and that the plaintiffs knew it. It is equally clear from his own uncontradicted evidence, and from the evidence of Wilson, that he had not means to provide the deposit which the notice of conditional acceptance of his tender

and the bond called for, and that he was entirely dependent upon being able to make arrangements with other persons to aid him in that respect also, and the plaintiffs knew this, or had reason to believe it.

It turned out that he was in fact unable within the stipulated time either to procure sureties or to make the deposit. The whole of the terms of the agreement were never discussed or settled between the parties, nor was any agreement or draft agreement ever drawn up or proposed or tendered to defendant. Some discussion took place on the last of the four days as to the time being extended, and Scarfe (a director) said to him that the bond gave till twelve o'clock Saturday night, and perhaps Monday would do. He said the defendant talked as though he would not carry out his tender that day. He said he would like the time extended in any event. Hawkins, the company's secretary, speaking of the same conversation, said, he understood the defendant to say distinctly he was not going on with the contract, and then the suggestion was made of extending the time until Monday.

Subsequently the plaintiffs on the 29th of January, 1889, accepted a tender from other contractors at \$153,536.00, and brought this action seeking to recover the whole penalty of the defendant's bond as the minimum damage they had sustained by reason of the breach.

The learned Chief Justice held that the provisions in the tender and bond "were contemporaneous acts to be done at the same time, and that without tender of the proper and necessary agreement the action was not maintainable."

Apart from any right the defendant may have to relief on the ground that the instrument sued upon was obtained under circumstances which make it unjust and inequitable to enforce it, the rights of the parties must be determined with reference to the peculiar nature of the instrument. It is not an agreement, but a bond with a condition—a condition not merely for the performance of an agreement recited therein, in which case if the condition

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J. A.

failed, it might be necessary to see whether or not the agreement had been broken, but a condition to do certain specified acts: *Beswick v. Swindells*, 5 B. & Ad. 914, 3 A. & E. 868, 873, 881; Pollock on Contract, 5th ed. p. 414. The obligation depends upon the obligatory part of the bond; the condition is introduced subsequently for the obligor's advantage. The condition is subsequent to the obligation, and if the condition be not fulfilled the obligation remains: *ib.*

The defendant attempted to put the case upon the footing of a mere agreement, comparing the condition from its vagueness to an agreement to make an agreement, which, when the terms of the agreement which is to be entered into are not defined, or its details are not such as the law will imply, is futile and cannot be enforced: Fry on Specific Performance, 2nd ed., secs. 349, 351, 359. But the cases are not parallel, and this must be dealt with upon the principles applicable to a bond or obligation, and the questions to be considered are: (1) Whether there has been a breach of the condition of which the plaintiffs are entitled to take advantage; and (2) If so, what damages they are entitled to recover.

In dealing with both these questions it is important to bear in mind the relation in which the parties stood toward each other when the bond was given, and the precise terms of the condition.

I think the learned Chief Justice was right in holding that the plaintiffs had not accepted the defendant's tender, and had not done anything to bind themselves to do so. Their resolution of the 22nd of January was not an acceptance, and their notice to him, which was not even couched in the terms of the resolution, was not an acceptance. Even if he had complied with the conditions of the notice as to furnishing the names of acceptable sureties, and paying a deposit, the terms of the proposed contract were still left open in many important particulars to be settled between the parties. The resolution (which was not communicated to the defendant) stipulated for a proper



agreement satisfactory to the board ; the notice informed him that the contract would be awarded " upon completing the proper agreements," and its terms therefore depended upon the subsequent assent of both parties.

Judgment.  
OSLER,  
J.A.

That being so, the plaintiffs induced the defendant to enter into this bond, to the precise terms of the condition of which I now invite attention.

" If the said P. Huffman to secure the completion of the railway, shall within four days from this date, furnish two acceptable securities to the said company, and deposit five per cent. of the amount of his tender, and shall execute and complete all proper and necessary agreements for the construction of the said railway by the 15th September next, and the commencement of said road by the 4th February next, and the continuous prosecution thereof thereafter until completion, then," etc.

It is to be observed that after they had obtained the bond, the plaintiffs were, as regarded any liability on their own part to the defendant, in precisely the same position as before. The bond was no acceptance of the tender ; they had entered into no binding contract with him, but had practically given him four days to look about him for his sureties and deposit ; in other words, to complete his tender. They had bound themselves to nothing, and that would still have been their legal position had the securities been tendered, and the deposit made within the stipulated time.

" The words of a condition shall be liberally construed to serve the intent of the parties : " Com. Dig. " Condition (E.) "

The bond was in the terms of the notice which had been sent to defendant, and the intention evidently was that at the expiration of the four days the parties should be in the same position as to making a contract as they would have been if the tender had been formally complete in the first instance ; that is to say, the contract would still have to be made.

The deposit would have been useless, and the securities

Judgment.

OSLER,  
J.A.

would have been useless, except as incidental to a completed contract, and there was no contract yet in existence. So that the condition to execute and complete all proper and necessary agreements implies something to be done before the condition could be performed, and is thus a condition to execute a contract which has yet to be made between the parties. The contract was therefore the principal thing.

“If there is a condition annexed to a writing obligatory for the benefit of the obligor, and the obligee is by the terms of it to do the first act, or to concur with the obligor in doing the first act, he must do, or concur in doing that first act before he can demand the penalty :” *French v. Campbell*, 2 H. Bl. 163, 178, 179 ; *Holdipp v. Otway*, 2 Saund. 102. “So, the non-performance of a condition shall be excused by the default of him who ought to do the first act ; as if a condition be to resign a benefice for a pension, to be agreed between them ; the obligee ought to agree the pension, and tender the deed of it :” *Com. Dig.* “Condition (L. 7.)”

The acts to be done were parts of a single transaction, and as the collaterals, the securities and deposit, would have been useless if there had been no contract, it appears to me that the first thing to be done was to make the agreement, which being made, the defendant was bound to execute and complete it, and comply in other respects with the condition. He had until the last moment of the fourth day to do the acts, but one of them, which was the principal, and to which the others were collateral, could not be done until the parties had concurred in making an agreement, for no agreement could be executed until it was first made, and it could not be made without the concurrence of the plaintiffs. The plaintiffs were therefore to do or concur in doing the act upon which all the others depended. But up to the last moment, they had not concurred in making an agreement, or tendered or offered to make one, so that if the defendant at the last moment of the time had procured his securities and deposit he could not have

executed the necessary and proper agreement by reason of the plaintiffs' default. The fallacy of the argument for the plaintiffs is that it assumes that nothing remained to be agreed upon, and seeks to put them in the position of having a bond to execute a contract of which the terms had been settled, and a right to recover damages for the non-execution of such a contract.

Judgment.

OSLER,  
J. A.

As to the pleadings, it may be that the plaintiffs averments are sufficient, the difficulty is that they were not proved.

It is said in paragraph six that the plaintiffs accepted the tender, which is not true; and that they were ready and willing and offered to do all things necessary to carry out the contract contemplated by the tender. This also was not proved, and as pleaded it does not refer to a time subsequent to the date of the bond, nor is there any evidence of the alleged request on their part to execute all proper and necessary agreements, or of notice to the defendant that they were ready to make them or to settle their terms.

Some reliance was placed upon the case of *Levy v. Herbert*, 7 Taunt. 314; 1 J. B. Moore 56. I think it is distinguishable.

The distinction is that there the agreement really defined the obligations which the defendant was to execute; and was equivalent to an obligation or agreement to deliver instruments in such a form as should satisfy the plaintiffs' counsel, in which case it was for the defendant to tender them to the plaintiffs' counsel to see if he approved and was satisfied with them: *Baker v. Bulstrode*, 2 Lev. 95.

Here there was no concluded agreement, and the agreement of both parties to the final terms was essential.

So, also, cases like *Mouck v. Stuart*, 4 U. C. R. 203; *Prindle v. McCan*, *ib.*, 228; *McDonald v. Snitsinger*, 5 U. C. R. 312; *Walker v. Kelly*, 24 C. P. 174, are inapplicable, where the obligor had bound himself to convey an estate to the obligee, or to give or make or execute a deed or other instrument, the terms of which are known to or

Judgment.

OSLER,  
J.A.

implied by the law and require no further agreement of the parties or concurrence of the obligee to supply or determine them. It is impossible in the present case to say that the bond contained the whole of the terms of the agreement, so as to preclude either party from insisting upon others.

On the argument of the appeal the plaintiffs urged that the defendant had by his conduct discharged them from preparing or tendering an agreement, or from attempting to make one. This is not pleaded, and it does not appear to have been set up at the trial. I am not satisfied that the evidence bears it out, nor do I think that justice requires us to allow an amendment. Besides the plaintiffs seem to have considered that they had nothing to do unless and until the defendant procured his sureties, and made his deposit, and it was not because of any default of his or of anything said by him that they did not make and tender an agreement for execution.

But, secondly, assuming that the plaintiffs are entitled to assign breaches of the condition it by no means follows that they are entitled to recover more than nominal damages. If the \$5,000, or five per cent. upon the amount of the tender, had been deposited to their credit, they could not have retained it, except as security for the performance of a contract, and *non constat* that any contract would be made. So, as to the securities, they were incidental to a contract, and if it be conceded in the plaintiffs' favour that the defendant was to move first towards settling the terms of a contract, and bringing about its execution, yet there having been no contract in fact, it is altogether a matter of conjecture whether one would have been made, what terms the plaintiffs would have assented to, or whether they would have assented to any which the defendant might have proposed. It is only necessary to look at the negotiations respecting the subsequent contract and its terms, to see how wide was the room for discussion not only as to terms, but as to arrangements with sureties, etc., and how difficult it is to say with



any degree of certainty that the parties would ever have reached the stage of being ready to execute "all proper and necessary agreements for the construction of the works."

Judgment.

OSLER,  
J.A.

If therefore the plaintiffs are entitled to recover at all I should assess the damages at one shilling, the only tangible damage they have sustained by reason of the defendant having failed to complete his tender.

They are attempting, in my opinion, to make use of the bond in an oppressive and unconscionable manner, and for a purpose not contemplated by either of the parties—certainly not by the defendant—at the time it was made. The inference I draw from the evidence is that the defendant was led to believe that he was signing something to limit the time within which he was to obtain his sureties and make the deposit, failing which the instrument was to be "null and void," and he would not get the contract. It is to me quite incredible, that, in the position in which he then was, he knew that he was binding or intended to bind himself absolutely to pay \$5,000, or any sum, as damages in the event of his failing in four days to procure sureties satisfactory to the plaintiffs, and in other respects implementing his tender.

I think the judgment at the trial was right, and that the appeal should be dismissed.

HAGARTY, C. J. O. :—

I agree in the result arrived at by my brother OSLER, and with the reasons on which it is based. I cannot see how the plaintiffs can be placed in a better or higher position than they would legally have been in had the defendant given the security and made the deposit mentioned in the bond; then would come the question as to agreeing on a contract to be executed by the parties to place them in the position of parties mutually bound to each other in specified terms. It would have been impracticable to get on unless and until most important matters had been further agreed

Judgment.

HAGARTY,  
C.J.O.

on, for example, the all important matter of payment. How and in what proportions and at what periods was this large sum to be paid to the contractor? He was bound to execute "all proper and necessary agreements" for the construction of the railway. How was such proper agreement to be ascertained? It can hardly be said that it was his business to prepare such a document. The plaintiffs took no steps whatever to prepare or offer it for execution. In truth it could have no existence till the intended parties should agree on and settle its terms.

When the condition speaks of executing all proper and necessary agreements, to make the meaning intelligible there ought to be some existing contract or bargain which he was to execute on which the parties had agreed on; in that view it would be intelligible to bind the defendant to furnish the securities and deposit the five per cent. A bond to execute an agreement to be thereafter arrived at by obligor and obligee has a hardly definite and sensible meaning.

I cannot but think that the learned Chief Justice of the Queen's Bench who tried the case took the right view after hearing the evidence. He says:

"I think the action is not maintainable; that the provisions in the tender and bond are all contemporaneous acts to be done at the same time, and without the tender of the proper and necessary agreement the action is not maintainable. From the beginning the company were not bound to accept the tender. I do not think they have accepted it. I think they kept themselves clear of acceptance. The bond was not an acceptance, and the letter was not an acceptance. The company was not bound, and I think the defendant was not bound to put up his money till such time as an agreement was ready to be executed which was a fair embodiment of the tender according to the specifications. That never was tendered, and I think therefore the action fails, and must be dismissed with costs."

I think the evidence warrants these statements. The plaintiffs kept themselves free to accept or reject the defen-

dant's tender, and the whole matter and dealing must surely have been designed to be subsidiary to the ultimate creation of a contract between them for the building of the road.

Judgment.

HAGARTY,  
C.J.O.

Its natural effect ought, and I think was, to put the plaintiffs in possession by the Saturday of what was wanting in the original tender—the sureties and the deposit.

I cannot believe that the defendant ever understood that the bond he was persuaded to sign could have the effect contended for by the plaintiffs; nor am I satisfied that at the time of its execution those acting for the plaintiffs understood it as they now contend.

A perusal of the evidence has left a somewhat unpleasant impression on my mind as to the bond's embodying the true meaning of the respective parties, *i. e.*, a bargain fully understood by both.

The man would naturally conceive, as he swears, that he was getting the additional time till Saturday to get the security and pay the deposit so as to enable him if he could to carry out his tender. The increase in the amount of deposit from the \$5,000 in the conditions to the 5 per cent. on \$138,568, is not without significance.

I thought for some time that the plaintiffs might be entitled to nominal damages for the breach as to sureties and deposit. But as the whole of the bond must stand or fall on the existence or ultimate non-existence of an actual contract, I think the action was properly dismissed.

The claim is not based on damages sustained from the plaintiffs not having a tender supported by sureties, and a deposit as required, which, as I think, they could reject or accept as they pleased, but on a larger demand for total loss by them of the defendant's offer to build the road at a lower rate than they could get from others.

We have before us a unilateral obligation to do certain acts, to prepare, as it were, for the presentment of a proper tender for works to be done under a contract. The plaintiffs I consider cannot be placed in any better position than

Judgment.

HAGARTY,  
C.J.O.

they would occupy on having such sufficient tender before them which it seems they could accept or reject at pleasure.

I think the action is one without merits, and I hope the law allows me properly to hold that it is not maintainable.

MACLENNAN, J. A. :—

I agree in the judgment of my learned brother OSLER, and have but little to add.

I think it is clear that there never was any unqualified acceptance of the defendant's tender by the company either before the making of the bond sued upon or afterwards, and that the company never was bound to give him the contract.

The bond therefore is of the strictest unilateral character, and if the plaintiffs were entitled to enforce it they would recover from the defendant a large sum of money for which he never received, and the company never gave, the worth of a farthing of consideration. It was contended by Mr. Blake that the defendant had the benefit of a delay on the part of the company of four days, but that is not so, the company were free to have given the contract to any one else the next moment after the bond was signed, and they might have done the same thing at any time during the four days, for anything to the contrary that there was between them and the defendant.

Then the bond is subject to several conditions to be performed within four days, of which I think the natural order is inverted, and the true meaning of them will, I think, become more apparent when they are stated in the natural order. They are as follows :

1. To execute and complete all proper and necessary agreements for :—

(a) The commencement of the construction of the railway by the 4th of February ;

(b) The continuous prosecution thereof until completion, and,

(c) The completion of the railway by the 15th of September.



2. To furnish two acceptable sureties to the company to secure the completion of the railway.

Judgment.

3. To deposit to the credit of the company in the Bank of Montreal five per cent. of the amount of his tender, also to secure the completion of the said railway.

MACLENNAN,  
J.A.

The agreement is evidently the first thing to be attended to. The defendant bound himself to execute all proper and necessary agreements for the commencement, prosecution and completion of the work. But, except the dates, there was not one single term of these proper and necessary agreements yet fixed or ascertained.

He had made a tender, that was all. The company had not assented to it, the recital in the bond is merely of the tender, no word of acceptance. There were none of the elements of a contract in existence except the dates for commencement and completion of the work, which were settled by the bond. The contract therefore had yet to be made. By the resolution of the board of directors it had to be "a proper agreement satisfactory to the board," and what the bond calls for is "all proper and necessary agreements for the construction and completion of the railway." I am at a loss to see how it was possible for the defendant to take any step towards the preparation of the agreements. It was the company's work. They alone knew what they wanted, and I think it was for them to prepare and tender the agreements for execution. This they did not do, and I therefore think that the defendant was not in default in respect of the condition for the execution and completion of the agreement.

Then as to the other two conditions, I think there was no default as to those conditions either.

It is evident that the words "to secure completion of the said railway" govern both the clauses which follow them, and that both the sureties and the bank deposit were for that purpose. Both the sureties and the deposit were to secure the performance of the contract. Now until the contract was made there could be no sureties, and therefore that condition was dependent upon the one relating to the contract.

Judgment.

MACLENNAN  
J. A.

I think the same is true of the condition for the payment into the bank; that payment was to be by way of security for the intended contract. I think the defendant was not obliged to pay the money into the bank to the credit of the company, generally, or without condition or qualification, or in the absence of an agreement binding on the company which would define the purpose for which it was so paid, and which would prevent it from becoming the absolute property of the company. The payment of the money, therefore, as well as the finding of the sureties, was to depend on the other condition of the bond, namely, the making of the contract for the construction of the railway, and the defendant being, as I think, in no default in respect of the latter, he was in no default in respect of either of the other conditions.

I think the appeal should be dismissed.

BURTON, J. A. :—

I agree with the learned Chief Justice of the Queen's Bench Division, that there never was an acceptance of the defendant's tender, but it does not follow that this action is not maintainable.

The plaintiffs intimated their willingness to award the contract to the defendant on his furnishing two acceptable securities, and making a deposit of five per cent. in the Bank of Montreal, and completing the proper agreements with the board.

These were the terms on which the board were willing to accept his tender. He was of course not bound to accede to these conditions, and if he had so determined there would have been an end of the matter.

The acceptance was still only conditional until he had complied with the terms mentioned in the notification, and he was entitled to a reasonable time to enable him to comply if so disposed. In the meantime the hands of the directors were tied and they were naturally anxious to have the matter decided one way or the other shortly so

as to enable them to deal with the other tenders if the one fell through.

They might have limited a time in their notification of their conditional acceptance, and had they done so the only effect of the defendant's non-compliance would have been that both parties would have been left free, and no liability created on either side.

But that was not the course adopted. The defendant instead of furnishing two acceptable securities and making the required deposit elected, whether wisely or not is not now the question, to enter into a binding obligation to furnish the securities within a specified time, and to deposit the money and also to execute and complete all necessary agreements for the construction of the railway by a named day.

Judgment.

BURTON,  
J. A.

That bond is not attacked as having been procured by any false representation.

By executing this bond the position of the parties was completely changed.

The defendant came under an obligation to pay to the plaintiffs the sum of \$5,000 from which he could only relieve himself by shewing the performance of the condition or some matter excusing the performance.

When we refer to the statement of defence the third paragraph raises or attempts to raise a perfectly immaterial issue, and must have been held bad upon demurrer.

The same remark applies I think to the fifth paragraph. It is not material that he was willing to give all the security which the tender called for, but the security which the condition of the bond called for.

It is nowhere alleged that the defendant performed the condition, nor is there any allegation excusing the performance, nor do I think it very important to enquire whether under the words of this condition: "shall execute and complete all proper and necessary agreements for the construction and completion of the railway by a named day," the duty was imposed upon the defendant or upon the plaintiffs of preparing and tendering an agreement, because

Judgment.

BURTON,  
J. A.

no such issue was raised or could have been raised at the trial inasmuch as even assuming that it would have been the duty of the plaintiffs to prepare and tender the contract under ordinary circumstances they were relieved from any such obligation by the conduct of the defendant, who informed them that he was unable to give the security without which no contract would have been accepted.

On principle it would seem that a bond with an impossible condition, or a condition which becomes impossible, should be dealt with just as if it were a direct covenant to perform that which is or becomes impossible. It seems still to be the law that if a man be bound by obligation with a condition which is impossible at the time the bond is entered into, the condition only is void, and the obligation good.

In the case of subsequent impossibility the strictly formal view is abandoned and an opposite result arrived at in cases where the performance becomes impossible by the act of God or of the law or of the obligee. If therefore it had been shewn that the obligor here had been ready to perform the condition by executing a contract, but had been prevented doing so by any act of the plaintiffs, the action must have failed; but here the defendant not being able to procure the security, and possibly under the erroneous impression that the obligation ceased to have any force at the end of the four days, abandoned the contract, and this, as at present advised, he was not at liberty to do.

I think, therefore, that the learned Chief Justice was wrong in non-suiting, and as the damages proved far exceed the penalty of the bond I have come to the conclusion—I may add, not without regret—that the appeal should be allowed and judgment entered for the plaintiffs for the amount of the penalty.

*Appeal dismissed with costs, BURTON, J. A., dissenting.*

An appeal by the plaintiffs from this judgment to the Supreme Court of Canada was dismissed with costs.



## BARBER V. CLARK.

*Mistake—Will—Legacy—Interest.*

THIS was an appeal by the defendant John R. Barber Statement. from the judgment of the Chancery Division, reported 20 O. R. 522, and came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 28th of September, 1891.

*J. H. Macdonald*, Q. C., for the appellant.

*G. H. Kilmer*, for the respondent.

At the conclusion of the argument the Court dismissed Judgment. the appeal with costs agreeing with the reasons for judgment in the Court below.

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## ABRAHAM V. ABRAHAM.

*Alimony—Judgment—Registration—Priorities—Assignments and Preferences—R. S. O. (1887) ch. 44, sec. 30—R. S. O. (1887) ch. 124, sec. 9.*

Statement. THIS was an appeal from the judgment of MACMAHON, J., reported 19 O. R. 256, by John Idington, a creditor of the defendant, in the name of John Hossie, assignee for the benefit of the creditors of the defendant, pursuant to an order made under the provisions of the Assignments Act. The appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 15th of September, 1891.

*Moss, Q. C.*, for the appellant.

*J. P. Mabee*, for the respondent.

Judgment. At the conclusion of the argument the Court dismissed the appeal with costs, agreeing with and adopting the reasons for judgment given in the Court below.

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## HAMILTON V. GROESBECK.

*Master and servant—Negligence—Machinery—Unguarded saw—"Moving"  
—"Defect"—Factories Act, R. S. O. (1887) ch. 208—Workmen's  
Compensation for Injuries Act, R. S. O. (1887) ch. 141.*

THIS was an appeal by the plaintiff from the judgment of the Queen's Bench Division, reported 19 O.R. 76, and came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 19th and 20th of May, 1891. Statement.

*Aylesworth*, Q. C., for the appellant.

*J. S. Fraser*, for the respondent.

*Irving*, Q. C., for the Attorney-General for Ontario.

June 30th, 1891. The appeal was dismissed with costs, Judgment.  
the Court holding that on the evidence no negligence on the part of the defendant was shown. The Court also held that as the injury in question did not occur in connection with the user of the saw it was unnecessary to consider whether the absence of a guard was a "defect" or not within the meaning of the "Workmen's Compensation for Injuries Act"; and also that as there was no evidence as to the number of persons employed on the premises in question it was not necessary to consider the points raised as to the construction of the Factories Act.

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## CENTRAL BANK OF CANADA V. GARLAND.

*Bills of Exchange and Promissory notes—Collateral hire receipts—  
Discount of notes.*

Statement.      THIS was an appeal by the defendant from the judgment of the Chancery Division, reported 20 O. R. 142, and came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 1st of June, 1891.

*G. H. Watson*, Q. C., and *C. A. Masten*, for the appellant.

*W. R. Meredith*, Q. C., and *F. A. Hilton*, for the respondents.

Judgment.      June 30th, 1891. The appeal was dismissed with costs, this Court agreeing with the reasons for judgment given in the Court below.

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## WHIDDEN V. JACKSON.

*County Court—Jurisdiction—Action—Assignment Act—R. S. O. (1887)  
ch. 124, sec. 20, sub-sec. 5.*

An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the County Court.  
Judgment of the County Court of Huron affirmed, HAGARTY, C. J. O., dissenting.

THIS was an appeal by the plaintiff from the judgment Statement.  
of the County Court of Huron.

The defendant was assignee for the benefit of creditors of one Samuel Whidden, the assignment being made pursuant to the Assignments and Preferences Act, R. S. O. (1887) ch. 124. The plaintiff claimed to rank upon the estate for \$200 for money lent by her to the insolvent before the assignment, and she was placed on the trial dividend sheet as a creditor for that amount and as entitled to a dividend of \$65.92. Objection was taken to the allowance of her claim and the defendant, under the direction of the creditors, gave notice of contestation in accordance with the provisions of the Act.

This action was thereupon brought by the plaintiff in the County Court of Huron asking "a declaration that she is entitled to be paid the said sum of \$200, and to rank upon the estate of the said Samuel Whidden in the hands of the defendant as such assignee thereof, and to receive a dividend or pro rata payment with the other creditors upon her said claim, and that the defendant may be ordered to pay the same." The action was dismissed for want of jurisdiction.

The plaintiff appealed and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 27th of May, 1891.

*Garrow, Q. C., for the appellant.  
J. H. Coyne, for the respondent.*

Judgment. June 30th, 1891. BURTON, J.A. :—

BURTON,  
J.A.

I come to the conclusion with regret that the objection as to jurisdiction is well taken, and that the appeal must be dismissed.

I do not, however, agree in the contention that the action is a statutory one. The right of a creditor to institute an action against a trustee under an assignment at common law for the benefit of creditors for a declaration that he was entitled to rank upon the estate, and to be allowed to execute the deed and receive dividends, always existed, and as I understand sub-section 5 of section 20 it gives no new right of action, but simply limits the time within which the action must be brought under the penalty of having the claim barred. But such an action of necessity must be brought in the High Court as it does not fall within any of the classes of cases mentioned in the sub-section defining the jurisdiction of the County Court.

I cannot agree to the contention that this is a personal action, by which I understand such actions as a man can bring "for debt or other chattels or damages to them or damages for injury to his person." It seems to me that it would be a perversion of language to apply it to such an action as this;—it has a persuasive ring about it as affording a short cut to what we may believe to be just in this particular case—but it is these short cuts which introduce uncertainty into the practice of the law, and render it difficult, if not impossible, for solicitors or counsel to advise their clients with safety.

OSLER, J. A. :—

I have been unable to discover any ground on which this appeal can be allowed. I regret this because, while it might seem to be a grievous hardship upon a small creditor to be compelled to establish his claim against his insolvent debtor's estate when contested, by even so expensive a proceeding as an action in the County Court, it is doubly hard to be obliged to do so by an action in the High Court.

That however I am compelled to hold is the position in which he is placed by section 20, sub-section 5 of the Assignments and Preferences Act, R. S. O. (1887), ch. 124.

Under the Insolvent Act of 1875, sec. 95, when a creditor's claim was objected to the matter was disposed of upon notice in a summary and moderately inexpensive way before the County Court Judge, and the claim, or the amount thereof, or the right to rank for, or privilege of, the claim, was finally settled upon such a contestation.

The process under chapter 124 as to proof and contestation of claims under a voluntary assignment is that proof of the claim is to be by an affidavit stating the amount and nature of the claim with particulars and vouchers, valuing the security, if any, held by the creditor, and if none, stating that fact : Sections 18, 19 (4), (5), 20. Then by section 20, sub-section 5, the assignee may serve notice of contestation of the claim at any time after he has received proof of it from the claimant. A special action must then be brought by him against the assignee, viz., an action to establish his claim, failing to bring which within thirty days after the receipt of notice of contestation or such further time as the Judge of the County Court may allow, his claim to rank on the estate is forever barred. I have called this action a special action. It is confined strictly to proving the right to rank on the estate. If the claimant succeeds he gains no more than the right to be placed on the dividend sheet. It is simply a contestation of the claim and is strictly analogous in its object and result to the proceeding in an insolvency under section 95 of the Insolvent Act of 1875. It cannot be compared to an action by the creditor against the assignee for administration of the trusts of the assignment. It is a strictly new and statutory remedy, an action for a declaration of right. Then in what court is such action to be brought ?

According to every principle on which the jurisdiction of an inferior court is examined it is limited to that which has been expressly conferred. Therefore we must find it either in the four corners of the County Court Act, or of

Judgment.

OSLER,  
J.A.

Judgment.  
OSLER,  
J.A.

the statute which governs the action, if it be of a different kind from any comprised in the former. In such an action as this, if the County Court has jurisdiction at all, there is no limit as regards the amount of the claim as to which the right of ranking is in question. Whether it be for \$200 or \$2,000 it is equally within the jurisdiction.

The County Courts have now no original equitable jurisdiction. That was taken from them by the Law Reform Act of 1868, 32 Vic. ch. 6, sec. 4, (O.) repealing secs. 33 to 66 of the County Court Act, C. S. U. C. ch. 15, but this consideration does not aid us very much, for I apprehend that such an action as the present might well have been brought at law before the Administration of Justice Acts or Judicature Act, if the statute by which it is given had then been in existence. I doubt very much if it could have been brought in the County Court even while the former equitable jurisdiction of that Court existed, because it is not an equitable action, but a new and defined statutory remedy. But within what branch of the County Court jurisdiction does such an action or proceeding now fall? The jurisdictional limit of that Court is carefully described in sections 18 and 19; in the former chiefly by exclusion, and in the latter by inclusion of the subjects of jurisdiction. I need only notice sub-sections (1) and (2) of section 19.

(1) "In all personal actions where the debt or damages claimed do not exceed \$200."

The present action does not come within that sub-section because even if it is accurately described as a personal action, yet it is not an action in which damages are claimed or a debt. The object of it is to obtain a declaration of the right to rank upon the assignor's estate in the hands of the assignee. Therefore it is not a personal action within the meaning of the section.

(2) The other sub-section is: "In all causes and actions relating to debt, claim and contract to \$400 where the amount is liquidated or ascertained by the act of the parties or by the signature of the defendant."



This sub-section cannot help the plaintiff, for, although the action in one sense relates to contract it is not in the sense meant by the clause, which evidently intends not only a contract made by the defendant who is sued thereon, but also one upon which a personal judgment may be obtained against the maker exigible by execution in the ordinary way.

Judgment.

OSLER,  
J.A.

I have not overlooked section 21 of the County Courts Act, but I agree with the learned Judge of the County Court that it only applies to causes of action within the jurisdiction of the Court, and does not extend or vary the primary jurisdiction under section 19.

I have looked at such cases as *O'Reilly qui tam v. Allan*, 11 U. C. R. 526; *Medcalfe v. Widdifield*, 12 C. P. 411, and at the Interpretation Act, R. S. O. (1887) ch. 1, sec. 8, sub-sec. 30. The only inference to be drawn from them is that something like express legislation was necessary to confer jurisdiction upon the County Court in actions for penalties even when the amount was within the limit of the Court. I can come to no other conclusion than that the legislature, whether designedly or by inadvertence, has not conferred jurisdiction upon the County Court in actions of this nature, and therefore that this appeal must be dismissed.

MACLENNAN, J. A. :—

I am clearly of opinion that the judgment of the learned County Judge is right, and that there was no jurisdiction to try this action.

The action is not brought to recover any sum of money, but to establish the claim of the plaintiff to rank upon the debtor's estate. It is the case of property assigned in trust for collection, and realization, and distribution among creditors. The plaintiff contends that she has a right to rank upon the estate, and the right is denied. She then brings an action, not against the debtor but against the trustee. She does not pretend that she has any personal demand against him, but only to have a share

Judgment.  
MACLENNAN,  
J.A. of the proceeds of the estate. No such action could have been brought at law when the jurisdiction of law and equity was distinct, but it would have been a suit in equity, for declaration of the plaintiff's right, and for administration of the trust estate if that became necessary. It is like the case of a suit for a legacy where there had been no assent by the executor, or a suit for a distributive share of a residuary bequest. Of course even a trustee might be sued at law when he had admitted a specific sum of money to be in his hands, and to be due to the plaintiff, just as an executor might be sued at law for a legacy after assent. But that is not the case here. It is not pretended that there is any specific sum admitted to be due.

Such being the nature of the action I think it is clearly not a personal action within the meaning of section 19 of the County Court Act.

It was contended that the action is a statutory one conferred by section 20 (5) of the Act respecting assignments. I do not think it would make any difference if it were. But I do not think that section gives an action. There was no occasion for such an action to be conferred, for there was always an action in such a case. All that the section says is that it shall be brought within a limited time, or if not it shall be barred. It is merely in my judgment a clause of limitation and nothing more.

I think the appeal should be dismissed.

HAGARTY, C. J. O.:—

The statute gives what I presume was intended to be a simple remedy to prove a contested claim against an insolvent estate: "An action shall be brought by the claimant against the assignee to establish the claim." If he establish it and to the extent thereof he becomes entitled to rank therefor.

I think this is a personal action. In the words of the County Court Act: "A personal action where the debt or damages claimed do not exceed \$200."

The fact that the judgment to be obtained is not personally against the statutable defendant, does not alter its character. It is an action to prove a debt or claim. That the defendant occupies a representative position does not make it less so. He is clothed by statute with all the rights of the original debtor, and it is his duty to distribute the estate.

The action is given by statute, a substitution, as it were, for the ordinary action between creditor and debtor. Everything that can be urged in the latter in proof of or resistance to the claim can be so urged in the present action.

I think it requires very little liberality of construction to take this view of an enactment intended to simplify and save expense.

Judgment.

HAGARTY,  
C.J.O.

*Appeal dismissed with costs, HAGARTY, C. J. O.,  
dissenting.*

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THE A. G. PEUCHEN COMPANY ET AL. V. THE CITY MUTUAL  
FIRE INSURANCE COMPANY.

*Fire insurance—Change of interest—Partnership turned into company—  
Avoidance of policy.*

Where the business of a partnership is taken over by a limited liability company formed for that purpose there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company.

Judgment of FALCONBRIDGE, J., reversed.

Statement.

THIS was an appeal from the judgment of FALCONBRIDGE, J.

The action was brought to recover the sum of \$1,000 under a policy of insurance against fire issued in the year 1886 by the defendants, and the main defence to the action was that there had been changes of interest material to the risk, which had not been communicated to the insurers, and that the policy had therefore become avoided under the statutory conditions.

The policy in question, covering stock, was issued in favour of the firm of Peuchen, Collins & Co., manufacturers of paints and oils.

That firm was composed of A. G. Peuchen, and one Collins, and was dissolved shortly after the policy was issued, Collins retiring. One Vaughan was then taken in as a partner by Peuchen, and that partnership continued till April, 1888, the firm being known as Peuchen, Vaughan & Co.

In April, 1888, Vaughan retired, and Peuchen carried on business alone under the name of A. G. Peuchen & Co. till November, 1888, when one French acquired an interest in the business, no change however being made in the name.

In September, 1889, the plaintiff company was organized, Peuchen and French being the chief shareholders. The fire occurred in October, 1889. During all this time the business was carried on in the same premises and was of



the same character. There was at the time of each change a general assignment of assets from the old firm to the new firm, but there was no special assignment of the policy, and the company received no notification of the changes. Statement.

The action was tried before FALCONBRIDGE, J., at Toronto, on the 18th of June, 1890, who gave judgment in favour of the plaintiffs as follows:—

This is an honest claim. The other companies interested in the loss paid up in full. These defendants set up a most technical defence, not to shield themselves against a fraudulent or even suspicious claim but to defeat a righteous one.

I am therefore pleased to find American authority to justify me in holding that the sale or assignment by one member of a firm to another does not avoid the policy. The insurance was one of partnership property, and the changes in the partnership or company do not appear on the evidence to have affected or to have been material to the risk.

I give the plaintiffs leave to add the names of all or any of the different concerns, and of the members thereof, as parties, and to amend their pleadings by claiming as trustees or otherwise as they may be advised.

Judgment will be entered for the plaintiffs for \$1,000 with interest and full costs of suit.

See the cases cited in Berryman's Digest, pp. 83, 197; *Powers v. Guardian Fire and Life Ins. Co.*, 136 Mass. 108; *Dermani v. Home Mutual Insurance Co.*, 26 La. Ann. 69; *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405.

The defendants appealed and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 3rd of June, 1891.

G. C. Gibbons, Q. C., for the appellants. The defendants relied at the trial wholly upon the defence that they had no contract with the plaintiffs, and the honesty or dishonesty of the claim was not in issue. There was no evi-

Argument.

dence of any assent to the assignment to the plaintiffs nor any evidence of any waiver of the statutory condition. This was not a case of a sale by one partner to another, but was the sale of the business to a corporation. There was a complete termination of the partnership and of all personal interest in the business. A. G. Peuchen had not at the time of the fire any interest whatever in the business or title to the property. It was vested in the corporation. A stockholder has no insurable interest: May on Insurance, 3rd ed., sec. 90; *Seaman v. Enterprise Fire Ins. Co.*, 18 Fed. Rep. 250; *Riggs v. Commercial Mutual Ins. Co.*, 51 N. Y. Sup. 466. The suggested amendments would not assist the plaintiffs as there has been an assignment of the property insured which vitiates the policy.

W. Nesbitt, and A. M. Macdonell, for the respondents. While the plaintiffs admit the several changes in the firm, in none of these changes, it is contended, was there a change in any way material to the risk or contrary to the spirit of the fourth statutory condition, the only defence relied upon by the defendants, for (a) there was never a complete sale of the property insured; when one partner went out his share or interest passed to the remaining partner or to the new one coming in: *Powers v. Guardian Fire and Life Ins. Co.*, 136 Mass. 108; *Scanlon v. Union Fire Ins. Co.* 4 Biss. 511; *Dermani v. Home Mutual Ins. Co.*, 26 La. Ann. 69; *Keeney v. Home Ins. Co.*, 7 Ins. L. J. 100; (b) A. G. Peuchen throughout remained a partner and owned the largest share and throughout the changes had an insurable interest; (c) after the incorporation of the Company A. G. Peuchen became one of the chief stockholders and president of the Company and throughout had a direct pecuniary interest in the concern: *Whyte v. Home Ins. Co.* 14 L. C. Jur. 301; *Seaman v. Enterprise Fire Ins. Co.*, 21 Fed. Rep. 778; *Smith v. Provincial Ins. Co.*, 18 C. P. 223; (d) the same premises were occupied, the same kind of stock kept, and there was no actual change in its custody: *Hoffman v. Aetna Fire Ins. Co.*, 32 N. Y. 405; *Keeney v. Home Ins. Co.*, 7 Ins. L. J. 100.

G. C. Gibbons, Q. C., in reply.

June 30th, 1891. HAGARTY, C. J. O. :—

Judgment.

HAGARTY,  
C. J. O.

I do not think the American authorities referred to, even if we accept them to guide our decision, can be said to affect the very serious objections urged by these defendants. I have examined all those specially referred to, and very many referred to in the voluminous digest of insurance cases.

If the case merely involved, as the learned Judge says, "the sale or assignment by one member of a firm to another," there would be a considerable amount of authority in the different States to the effect that the policy was not thereby avoided.

There is also the authority of a well-considered judgment of the Lords of Session, in *Forbes & Co. v. Border Counties Fire Office*, 11 Ct. of Sess. Cas., 3rd Series, 278. See May on Insurance, 3rd ed., sec. 279.

The case before us is of very different character. We have our positive statutable provision. The defendants insist on it.

It seems impossible to contest the fact that this personal property, the subject of the insurance, has been "assigned" without written permission. Giving the assured all the benefit of the cases cited, can it be properly held that the subject of insurance has not been assigned? At the time of the loss the whole subject matter had been conveyed to the Joint Stock Company and that company, and not Peuchen or any co-partner of his, could be considered the owner. He was a large shareholder in the joint adventures, his interest depending on its financial success.

I cannot see that the cases cited to the effect that a shareholder may have an insurable interest in the property of the Company can affect the question for decision. No such interest was here insured. The Legislature has made this matter of assignment a ground of forfeiture of interest and we cannot ignore or lessen its effect. I think we will be travelling far beyond any reported decision known to our Courts, if we hold that

Judgment.  
HAGARTY,  
C.J.O.

an insurance of the property of an ordinary firm of Peuchen, Collins & Co., continues without the consent or even knowledge of the underwriters to protect a Joint Stock Company, to whom the subject matter is wholly assigned.

We think the appeal must be allowed, and the action below dismissed.

BURTON, J. A. :—

I quite agree in the law laid down by the learned Chief Justice, and if this action had been brought by the parties to whom the policy in this case was issued, the facts referred to by him would have furnished a complete answer.

But the short answer to the plaintiffs' claim in this case is, we never entered into any such contract with you.

I cannot say I am much enamoured with what I may not inappropriately style the wholesale power of amendment now so frequently indulged in even after the case has been heard and stands for judgment; but the most liberal exercise of the leave granted would not assist the claimants, and the morality of the defence had better be left with the public, and those seeking the advantage of insurance. Resistance to a just claim is a poor advertisement for any company, but in making that remark, I do not wish to be understood as expressing any opinion upon the merits of this case.

OSLER, J. A. :—

I am obliged to agree that the appeal should be allowed. I think it should be without costs. Under the circumstances disclosed in the evidence the defence is most discreditable to any company which desires to have the name of being respectable.



MACLENNAN, J. A.:—

Judgment.

MACLENNAN,  
J.A.

I would be very glad to uphold this judgment if I could, for I see no shadow of a ground on which payment of the loss ought to be withheld. In the defence, advantage is being taken of a purely accidental oversight, in not having the insurance put in the name of the incorporated company, when the last premium was paid, and leaving it instead in the name of the original partnership.

The policy was made on 15th November, 1886, insuring a firm of Peuchen, Collins & Co., and it was upon a stock of paints, etc., and materials used in the manufacture of paints, of their own, held in trust or on consignment, while contained in a building owned and occupied by assured as a paint factory, on Princess street, Toronto. The fire occurred on the 5th October, 1889. The business was carried on continuously from the date of the policy, till the fire, but during the interval several changes took place in the firm, members going out and others coming in, and finally in September, 1889, the business was turned into a joint stock limited company, which was in possession, and by which the business was carried on, at the time of the fire. A. G. Peuchen was one of the partners when the policy was made, and he continued to be a member of the firm at all times, and became a large shareholder in the company, and its manager, and that was his position at the time of the fire. The annual premium on the policy was regularly paid to the defendants, through an agent who was aware, not by any formal notification, but just as any person observing what was going on around him might become aware of it, of the changes that took place in this business firm, including the change into a company. The receipts for premiums, however, were in the original name of Peuchen, Collins & Co.

There is no doubt that the property as well as the possession of the goods damaged by the fire were in the limited company, and there is no suggestion that they were held in trust or on consignment, and I am therefore,

Judgment. at a loss to see how it is possible for the limited company,  
MACLENNAN, or for Peuchen, who has been by permission of the  
J.A. learned Judge at the trial made a co-plaintiff, to recover  
upon any principle either of law or equity.

The contract of fire insurance is one of indemnity. There was no contract with the limited company, and it was they who alone suffered loss. Peuchen again was a party to the contract, but he has sustained no loss. He had parted with all interest in the goods, before the fire, and can recover nothing, even if he could otherwise do so in view of the changes in the personnel of the firm which had previously taken place, as to which I express no opinion. It was contended that Peuchen could recover as being a holder of the goods *in trust*, being the manager of the company, these words being in the policy. I desire not to cast any doubt whatever on the efficiency of these words in the cases in which they are ordinarily used, to protect goods of which the assured is in possession as a mere bailee, but there was no trust or bailment here. It was the company that was the owner of the goods, and it was the company that was in possession of them, not Peuchen. He was merely the servant of the company, and personally had no legal relation to the goods any more than a mere stranger.

It was also contended that as shareholder Peuchen had an insurable interest in the goods. If that is conceded for the sake of argument, I think it affords no assistance to the plaintiffs, for that is not the kind of interest that was insured, nor is that the kind of case that is made by the pleadings or to which the evidence was addressed, and it would be out of the question in my judgment to allow a recovery in this action upon such a view of the case.

I am therefore, with regret, of opinion that the appeal should be allowed.

*Appeal allowed with costs.*

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ATTORNEY GENERAL V. THE NIAGARA FALLS, WESLEY  
PARK AND CLIFTON TRAMWAY COMPANY.

*Crown—Injunction—Breach of charter.*

The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. (1887) ch. 171, which authorized them to construct and operate (on all days except Sundays) a street railway.

*Held* [MACLENNAN, J. A., dissenting] that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public or any interference with proprietary rights being shewn.

Judgment of the Common Pleas Division, 19 O. R. 624, affirmed.

THIS was an appeal by the plaintiff from the judgment Statement. of the Common Pleas Division, reported 19 O. R. 624.

The defendants were incorporated by letters patent issued under "The Street Railway Act, 1883," now R. S. O. (1887) ch. 171, with authority to build and operate (on all days except Sundays) a street railway in the town of Niagara Falls.

The defendants operated the railway on Sunday, and this action was brought by the Attorney-General for Ontario, on the relation of the Reverend Richard Hobbs, a Methodist minister of the town of Niagara Falls, for an injunction to restrain them from so doing.

The action was tried before MACMAHON, J., at St. Catharines, on the 19th of October, 1888. No injury to the person or property of the relator, or to the public generally, was shewn, and the claim to relief was based apparently solely on the moral ground of preventing Sabbath desecration. It was shown on behalf of the defendants that the street railway was extensively used on Sunday by persons attending Divine service in certain places.

The action was dismissed by the trial Judge, and his judgment was affirmed by the Divisional Court, ROSE, J., dissenting.

The plaintiff appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER,

Argument. and MACLENNAN, JJ.A.] on the 2nd and 3rd of June, 1891.

*J. R. Cartwright*, Q. C., and *A. M. Dymond*, for the appellant. Were it not for their charter the defendants could not lawfully run this line at all, and it is clear therefore that they cannot run it lawfully on Sunday as certainly no power to run on that day is given. But not only is the power not given; it is, for greater caution, expressly negatived, and the right of the Attorney-General to restrain the violation of the terms of the charter is clear. It is not necessary to shew specific injury to property or person, or to the public generally. See *Attorney-General v. Cockermouth Local Board*, L. R. 18 Eq. 172; *Attorney-General v. Mid-Kent R. W. Co.*, L. R. 3 Ch. 100; *Ware v. Regent's Canal Co.*, 3 DeG. & J. 212; *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154; *Attorney-General v. Ely, Haddenham and Sutton R. W. Co.*, L. R. 4 Ch. 194; *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449; 5 App. Cas. 473; *Attorney-General v. Shrewsbury Bridge Co.*, 21 Ch. D. 752.

*A. G. Hill*, for the respondents. At most there is no more than an implied prohibition against operating the road on Sunday, and there is no wrong committed, or else there is an offence against the Lord's Day Act. In either view the court will not interfere. If the operating of the road is a criminal offence under the Lord's Day Act, the court will not interfere by way of injunction to restrain the crime nor will it enforce a moral duty except so far as the same is concerned with the rights of property: *Saull v. Browne*, L. R. 10 Ch. 64; *Kerr v. Corporation of Preston*, 6 Ch. D. 463; *Kerr on Injunctions*, 3rd ed., p. 5. And the court will not interfere by way of injunction unless a wrong is being committed. It must be shewn that some property, or proprietary right, is being interfered with. There is no pretence that such is the case here: *Attorney-General v. Cleaver*, 18 Ves. 211; *Attorney-General v. Mayor of Kingston*, 34 L. J. Ch. 481; *Attorney-*



*General v. Gee*, L. R. 10 Eq. 131 ; *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449 ; 5 App. Cas. 473 ; Kerr on Injunctions, 3rd ed., pp. 5, 532.

*J. R. Cartwright*, Q. C., in reply.

June 30th, 1891. HAGARTY, C. J. O. :—

I think the state of the law on the authorities reviewed is very clearly shewn in the latest of the cases cited, by Fry, J., in *Attorney-General v. Shrewsbury Bridge Co.*, 21 Ch. D. 752. In 1882, the defendants there, after their powers had expired under the special Act, had been driving piles into the Severn, and interfering with a public highway.

Fry, J., says: "The question is, had the Attorney-General a right under the circumstances to intervene without shewing substantial injury to the public? It appears to me that there is a conflict of authority on this point, or rather some want of uniformity in the various authorities."

He held that the acts complained of were in their natures such as tended to injure the public, although no actual injury was proved.

In the case before him, the defendants, without corporate or statutable authority, interfered with a public highway or navigable stream. The Attorney-General was proceeding at the relation of two shareholders.

I think it is clear that where a company is doing an act directly forbidden by the statute, as pouring sewage into a natural water-course, as in the *Cockermouth Case*, the injunction will be granted without proof of actual injury.

Also where the company was working the line after the Board of Trade on survey had forbidden its use on behalf of public safety.

Also when the railway company were entering largely into the purchase of coal to be carried on their line, being an application of their capital to subjects wholly uncovered by their chartered powers.

Judgment.

HAGARTY,  
C.J.O.

Where the legislature specially prohibits certain acts, then the Court will hold they must be restrained, Jessel, M. R., remarking that they were the best judges whether such acts were or were not allowable.

My learned brother ROSE, in the Court below, quotes Lord Blackburn's language in *Attorney-General v. Great Eastern R. W. Co.*, 5 App. Cas. 473, at p. 481, speaking of *Ashbury etc. Co. v. Riche*, L. R. 7 H. L. 653; that when an Act creates a corporation for a particular purpose, what it does not expressly or impliedly authorize is to be taken to be prohibited.

I think this doctrine must be considered as applicable to the case in judgment, and not to a case like the present.

In the *Ashbury Case* the company was incorporated for the making, selling or letting on hire railway carriages, etc., and plant and rolling stock, and to carry on the business of mechanical engineers and contractors, and to purchase, lease, etc., mines, minerals, lands and buildings, and to sell timber, metals, materials, etc.

The directors agreed to purchase a concession for making a railway in Belgium. They were sued for breach of contract. The defence was that the contract was *ultra vires*, and so it was held by the Lords, and that it was for objects not set out or contemplated in the memorandum or articles of association. The Lords held that in effect the statute expressly forbade this departure from the articles. The Act said, that "save as aforesaid \* \* no alteration shall be made in any company in the conditions contained in its memorandum of association."

The principle seems very clear. The capital must not be diverted from the purposes expressed in the charter or memorandum of association.

A railway company chartered to build a road from London to Harwich, would be restrained from applying its capital to start a line of steamships from Harwich to the continent. That class of case is well known, and as Lord Blackburn says :

“A company created for working a line of railway is prohibited from doing anything that would not be within that purpose.”

Judgment.  
HAGARTY,  
C.J.O.

I do not think that anything there said can affect the decision in this case.

It was pointed out in the Court below by Sir Thomas Galt, C. J., that in the case before us there is no express prohibition as to Sunday use.

The corporate powers are granted for every day except Sunday, and that consequently if they run the railway on Sunday, and thereby commit a nuisance or an offence of any kind they are not protected by the Act, but are liable; or if by so doing, they injure any right of property they are liable. There seems to be much force in this.

The case was presented at the trial in a very bald form; no pretence was made that there was any injury to person or property, or to the public generally.

It seems to be rested solely on the moral ground, that it was a desecration of the Lord's Day, and objectionable to the conscience of the only witness examined.

After all the consideration I can give the matter and the examination of the various authorities, I come to the conclusion that the vigorous language of Lord Justice James, (with whom Bramwell, L. J., agrees) in *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449, at p. 482, rightly expounds the law.

There is not in the case before us any “plain and sufficient public mischief shewn to warrant a suit on behalf of the Sovereign or the public.”

When the case went to the Lords, 5 App. Cas. 473, it was decided against the information on a wholly different ground, Lord Blackburn saying: “The second point which is whether or not this case is a proper one for the Attorney-General to interfere in, and to what extent the powers of the Attorney-General in such cases go, is one which I consider of great importance; and whenever it becomes necessary to decide that question, I should desire to look into it very carefully, and to consider carefully what was the proper doctrine to be applied in such a case.”

Judgment.

HAGARTY,  
C.J.O.

Two years later, was the case before Fry, J., which I have already referred to.

The case before Lord Hatherley : *Attorney-General v. Ely, etc., R. W. Co.*, L. R. 4 Ch. 494, was dismissed, the Chancellor agreeing with the Master of Rolls that the Act had been substantially complied with. In all the cases the full merits are examined, and it seems to me to be clear that a case must be made out to warrant the interposition of the Attorney-General on behalf of the Sovereign and the public.

As James, L. J., says in *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D., at p. 472 : "The Court must exercise its discretion and the Attorney-General ought to exercise his discretion as to whether a sufficient case is made out for the interference of this Court. We do not mean to contend that any technical violation would do ; we admit that it must be such as the Attorney-General in his discretion first of all, and the Court in its discretion afterwards, thinks of sufficient magnitude to warrant an injunction."

Kindersley, V. C., in *Attorney-General v. Great Northern R. W. Co.*, 1 Dr. & Sm. 154, very clearly points out the right of the Attorney-General to interfere where the interests of the public are damnified. See Brice, 2nd ed., 901.

It is conceded that the Court must not interfere to vindicate any moral duty or to prevent any violation of the criminal law.

The latter law is sufficient to punish any violation of the Sunday contrary to the statute.

The defendants may be seriously hampered in the full use of their railway on this first day of the week, if their corporate powers be held not to extend to that day.

But I cannot see on what ground I can hold that the trial Judge and the Divisional Court have arrived at any erroneous conclusion.

The very careful judgments in the Court below have rendered it unnecessary to notice more fully the various cases.



The Attorney-General in his discretion allowed this information. But I am compelled, in the independent exercise of my discretion as a Judge, to hold that the case does not disclose that the public interests are so damnified (as the language is) to warrant an injunction.

Judgment.

HAGARTY,  
C.J.O.

BURTON, J. A. :—

I think the judgment of the Divisional Court affirming that of my brother MACMAHON is right, and ought not to be interfered with.

It may be that the company by a deliberate act of the nature complained of, with the knowledge that the Legislature had refused to grant permission to run their cars on Sundays, has exposed itself to the risk of having its charter repealed upon a proper application. That is their affair, and I express no opinion upon it ; but can we say that the judgment of the Court below is wrong in holding that this was not a case in which the Attorney-General, as representing the public, had a right to call for the intervention of the Court, or as put in one of the cases, in holding that it was not a case of sufficient public wrong to make it the duty of the Court to interfere with the company in the conduct of its own business ?

Beyond granting his fiat I assume that the Attorney-General had little to do with the conduct of this case, until it came before us on appeal. The information reads more like an ordinary bill of complaint than an information at the suit of the Attorney-General, and would, in my judgment, have been bad on demurrer, and was properly dismissed on the hearing. There was not only no evidence of any injury to the public, but on the contrary of its being a very great convenience in enabling many people to attend a place of Divine worship, which otherwise they could not have done.

Human nature does not seem to have changed much in 1,800 years ; but it is really painful to find in this nineteenth century any one, and especially a person assuming

Judgment.  
BURTON,  
J.A. to be a teacher of religion, grudging the enjoyment of a number of poor people and their families who avail themselves of perhaps the only day open to them to visit and enjoy one of nature's grandest works, because in order to do so they have to travel a few miles by train or other vehicle. It would seem almost incredible had we not the witness's admission in his evidence.

I cannot profitably add anything to my brother MACMAHON'S very able judgment in which I fully concur, and think the appeal should be dismissed.

OSLER, J. A. :—I concur.

MACLENNAN, J. A. :—

I have the misfortune to differ from the other members of the Court on this appeal ; but entertaining a clear opinion that the judgment appealed from is wrong, I feel bound to express it.

I think my brother ROSE has taken the correct view of the case in his judgment in the Divisional Court, and he has expressed my views so fully that I have little to add to what he has said.

In my humble opinion, where an Act of Parliament, or a charter, gives certain powers with an express exception, it is no longer, since the decisions in the House of Lords of *Ashbury etc. Co. v. Riche* L. R. 7 H. L. 653 ; *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. 449 ; 5 App. Cas. 473 ; and *Baroness Wenlock v. River Dee Co.*, 10 App. Cas. 354 ; arguable that what is so excepted is not forbidden and prohibited. And I think that the exception being express, the prohibition is also express, and that the charter must be taken expressly to declare that the excepted thing shall not be done.

Then this case is that the company is deliberately doing the very thing that the charter says they shall not do. They have accepted a charter which allows them to exercise their corporate powers on every day except Sunday, and

they deliberately disregard that prohibition, and exercise them on the forbidden day. I think it utterly immaterial that Sunday is the excepted day, it would be entirely the same question if it was any other day or several other days in the week which were excepted. The Legislature, or the Governor in Council, which in the granting of these charters is executing legislative powers, powers delegated by the Legislature, has thought fit to insist on the exception, and as we must assume, has done so on public grounds, in the public interest. And I think, that when the Attorney-General has granted his fiat for the information he must, as representing the Crown and the public, be taken to declare that the government of the country deems it for the public interest that the exception in the charter should be maintained.

Judgment.  
MACLENNAN,  
J.A.

I think this case comes exactly within the language of James, L. J., in the Court of Appeal, *Attorney-General v. Great Eastern R. W. Co.*, 11 Ch. D. at p. 483, where he says: "Where a company entrusted with large powers is deliberately violating an express enactment, or disregarding an express prohibition of the Legislature, it is really committing a misdemeanour and ought to be at once stopped:" and I take the learned judge to mean stopped by injunction, and not by *sci. fa.* to repeal the charter, or by Act of Parliament, or by mandamus. There is also another passage in his judgment which I think fits the present case. On the following page he says: "I am far from saying that a railway company ought to be permitted to carry on the trade of iron-masters, or colliery proprietors, or rolling stock manufacturers, not casually, not incidentally, not collaterally and in the *bonâ fide* conduct of their own property business, but as really a distinct and separate trade. I can conceive that such a case might be properly considered by the Attorney-General, and considered by this Court, as a fraud on the Legislature which had created and authorized the company only for what it professed and undertook to do; but, at all events, it must be something great, something substantial, to warrant such interference."

Judgment.

MACLENNAN,  
J.A.

The principle to be deduced from this judgment of James, L. J., is, I think, that for trifling, casual, incidental, collateral, *ultra vires* acts, not done *malâ fide*, neither the Attorney-General nor the Court ought to interfere, but that in the case of great, deliberate, substantial acts of that character, the interference ought to be prompt and unhesitating. I think what is done here is neither trifling, casual, incidental, collateral, nor *bonâ fide*, but is a great, substantial and deliberate violation of the charter, and being deliberate cannot be otherwise than *malâ fide*.

I have referred to what was said by James, L. J., and cite also what was said in the same case by Bramwell, L. J., at p. 502. He says: "I have no doubt that if a thing is prohibited by the statute creating a corporation, the doing of that thing is unlawful, and may be restrained. I have no doubt that, if a corporation is created by royal charter, and the provisions of the charter are disobeyed, the charter is jeopardised. I have no doubt that, if a railway company is prohibited from opening their railway with a single line, it may be restrained from doing so, \* \* and that other acts contrary to law, or contrary to a duty, or right of the public, may be restrained or punished." And then he goes on to indicate the doubt he has by putting the case of a company incorporated as hatters dealing also in boots, there being no prohibition in the charter.

I think it is evident it was Lord Bramwell's opinion that in a case like the present there ought to be an injunction, however it might be in a case where there was no express prohibition, and the opinion of Baggallay, L. J., is admitted to be clear and strong the same way.

But there is also the later judgment of Fry, J., in *Attorney-General v. Shrewsbury Bridge Co.*, 21 Ch. D. 752, in which he restrained *ultra vires* acts of a bridge company without requiring any evidence of actual injury to the public, on the ground of their tendency to interfere with public rights; and he cited decisions of Lord Romilly, Jessel, M. R., and Lord Hatherley, all maintaining the jurisdiction of the Court to interfere at the instance of the



Attorney-General where the act is illegal and affects the public generally. Judgment.

MACLENNAN,  
J.A.

I think that the right to run their tramway on Sunday was deliberately and expressly withheld from this company, and that the express exception in this charter is equivalent to a declaration of the Legislature that it was for the public interest that that power should be withheld, and that it was inexpedient to grant it. That being so all the authorities, including even the judgment of James, L. J., are in favour of the appeal, which should therefore, in my humble judgment, be allowed.

*Appeal dismissed with costs, MACLENNAN, J. A.,  
dissenting.*

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## MCMICHAEL V. WILKIE ET AL.

*Husband and wife—Power to sell lands—Exchange—Separate estate—Contract by implication.*

*Held*, reversing the decision of the Common Pleas Division, 19 O. R. 739, that the power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby.

*Held*, also, by OSLER, and MACLENNAN, JJ.A., that the implied obligation to pay off the encumbrance which in the case of a conveyance of land to a person *sui juris* is imposed by a Court of Equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property.

The practice as to giving relief to one defendant against a co-defendant considered.

Statement.

THIS was an appeal by the defendant Mary S. Morton, a married woman, from the judgment of the Common Pleas Division, reported 19 O. R. 739.

The action was brought by the plaintiff, the mortgagee of lands in Manitoba, to recover the money secured by the mortgage, and the defendants were the mortgagor Wilkie, and McCord and Mrs. Morton, who were alleged in the writ of summons to have covenanted to pay the mortgage debt. In the statement of claim nothing was asked but judgment for the debt, and not any relief by way of foreclosure or sale of the land. The liability of the defendant McCord was alleged to arise from a collateral covenant made by him with the plaintiff, and the case made against the defendant, Mrs. Morton, was put in this way. It was said that after the making of the mortgage to the plaintiff, Wilkie (the mortgagor) and Mrs. Morton made an exchange of lands, Wilkie conveying to Mrs. Morton the land in question subject to the plaintiff's mortgage, and Mrs. Morton conveying to Wilkie other land, also subject to mortgage. Then followed an allegation that it was agreed and understood between Wilkie and Mrs. Morton that each should assume and pay the mortgages upon the properties which each took in exchange from the other, and should mutually indemnify each other against the same.

It was further stated that Mrs. Morton was made a party Statement. to prevent circuitry of action, because Wilkie claimed that Mrs. Morton ought to pay the plaintiff's debt, and protect him from his covenant. The plaintiff then alleged that all the defendants were liable to him, and he claimed judgment accordingly.

The defendant Wilkie put in a long statement of defence in which he denied that the amount claimed by the plaintiff was due, and set forth the exchange between him and Mrs. Morton in detail, contending that the latter was primarily liable to the plaintiff, and that if he, Wilkie, was made liable, Mrs. Morton should be ordered to repay to him what he might be obliged to pay.

Mrs. Morton's defence was that she was a married woman, and that even if the alleged exchange had been made she was not liable to the plaintiff, and she submitted that she was improperly made a party to the action.

In September, 1888, notice was served by Wilkie's solicitors of a motion to be made at the trial to amend his defence by setting up that at the time of the exchange Mrs. Morton was a married woman and "entitled in her own right to various properties," other than that which was the subject of the exchange and that the defendant Wilkie's dealings with her were had "on the faith of such separate estate," and also that Mrs. Morton had at the time of the transaction, and still had, separate property more than sufficient to pay the amount due on the said mortgages assumed by her as aforesaid.

Afterwards, in December, Wilkie's solicitors applied to the Master in Chambers under Consolidated Rule 328, for directions for the trial of the issues between him and Mrs. Morton, and for an affidavit on production by the latter, but the application was dismissed. An appeal was taken from that order to a Judge in Chambers, and the motion by way of appeal was adjourned to the trial.

The action was tried before MACMAHON, J., at Toronto, on the 30th of January, 1889, when judgment was given against Wilkie and McCord, and the action was dismissed as against Mrs. Morton with costs.

Statement.

From this judgment the defendant Wilkie appealed to the Divisional Court and that Court, MACMAHON, J., dissenting, held, that the transaction of exchange itself was proof of separate estate, and that the liability followed, and they reversed the judgment.

Mrs. Morton appealed, and the appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 13th of March, 1891.

The transaction in question had been entered into by the husband of the defendant Morton, who assumed to act under a general power of attorney giving him authority to sell her real estate in such manner and at such prices as he should think fit, and generally to act in relation to her real estate as fully and effectually in all respects as she could do if personally present, and the appeal turned mainly on the construction of this instrument and the evidence relating to the transaction.

*E. D. Armour*, Q. C., for the appellant.

*W. H. P. Clement*, for the respondents.

June 30th, 1891. HAGARTY, C. J. O. :—

The defendant, Mrs. Morton, a married woman living with her husband, gives him a power of attorney which provides that he may sell her lands in such manner and at such prices as he shall think fit and generally act in relation to her real estate as fully as she could do. I agree that, standing by itself, unexplained by further actions on her part, she does not authorize him to take property in exchange or as part of the price of her lands subject to a mortgage which fixes on her the liability to indemnify the mortgagor against such encumbrances.

Selling her land on such terms as the attorney may deem proper cannot be held an authority to fix her with pecuniary liability such as is here sought to be fixed on her.



I can find nothing whatever in the evidence to prove any knowledge on her part of the assumption of this liability. The husband states that he made payments of interest to the plaintiff McMichael on this mortgage and charged them against her separate estate which he entered in some ledger or book.

He is asked: "She was aware you were making these payments?" He answers: "I don't suppose she was aware. I was acting fully with her power of attorney, and I transacted her business entirely without consulting her."

She was not called as a witness or interrogated as to her knowledge. We can only infer from the evidence that the husband acted wholly on his own judgment; and no knowledge of his proceedings as to his taking in exchange this Manitoba land is brought home to her.

But it appears that when he completed his bargain with Wilkie's agent, she personally executed the two deeds to him of the property which he had agreed to convey to Wilkie. These deeds are in ordinary form as for sales for cash; one for the consideration of \$6,500, the other for the consideration of \$2,500. Neither of them contains any reference to any other or different consideration. Both deeds are stated to be subject to certain stated mortgages.

I cannot see that her execution of these deeds imports anything further against her beyond that she must know that she is selling her property therein mentioned, which proceeding would be the natural result of her husband's action under his power of attorney.

As already noticed the plaintiff makes no attempt to prove Mrs. Morton's knowledge of this Manitoba matter. As to the \$900 said to have been paid in money by Wilkie, there is nothing to connect the wife with its receipt.

The case is of course open to the remark that in the nature of things a husband living with his wife would naturally inform her from time to time of whatever bargain he had made as to the disposition of her property. We cannot assume this on the evidence before us.

The Legislature has been pleased to give the married

Judgment.  
HAGARTY,  
C.J.O.

Judgment.

HAGARTY,  
C.J.O.

woman nearly all the privileges, rights and powers of a single woman. If Morton had obtained this power of attorney from a stranger it would, as I think, be an unauthorized act on his part to dispose of his property by accepting another property in exchange; thereby involving his principal in a heavy liability to another person.

If he forward or present to his principal for execution a conveyance of the property he was clearly authorized to sell, the party executing cannot thereby be held liable to have had knowledge or to have sanctioned the acceptance of any other consideration than is expressed in the instrument. I think the same rule must govern here, and that the appeal should be allowed.

BURTON, J. A. :—

I think, with great respect, that the judgment originally pronounced by my brother MACMAHON was correct, and should be restored.

The power of attorney to the husband clearly did not authorize an exchange or empower him to enter into any engagement on her part to assume the mortgage in question, or to indemnify her co-defendant Wilkie against it, and the fact that she personally executed the deed of the property does not advance his case. That deed purported to be a conveyance in pursuance of a sale for a money consideration, and there is not a particle of evidence to show that the exchange was ever mentioned to her.

We may think it probable that she knew all about it, but that is not the way in which we are at liberty to deal with people's rights. It is upon evidence and evidence alone that we are authorized to act.

Mrs. Morton might have been called and she could have cleared up the matter at once, and the inference from her not being called is that she would have denied all knowledge of the transfer to her of Manitoba lands. If so what evidence is there of an agreement express or implied to indemnify her co-defendant?

I can quite understand that if it had been shown that she was in possession of the rents and profits of the land, or that she was aware that the interest paid by her husband was being charged against her, there would be evidence on which the Court might infer such an obligation; but a deed made to her without her knowledge, subject to a mortgage, is no evidence of an agreement on her part. She denies that she ever made such an agreement, and there is no evidence in support of it.

Judgment.

BURTON,  
J.A.

Without entering upon the other questions argued, I think it impossible to hold that there is any evidence here to warrant a recovery against her or her separate estate, and that the appeal should be allowed.

OSLER, J.A.:—

The case of *Palliser v. Gurney*, 19 Q. B. D. 519, approved and followed by the Court of Appeal in *Stogdon v. Lee*, (1891) 1 Q. B. 661, shews that the Married Women's Property Act, 47 Vic. ch. 19, R. S. O. (1887) ch. 132, does not enable a married woman to render herself liable on a contract unless she has some separate property at the time the contract is made, and that the onus is on the party who seeks to enforce the contract to prove that she then had separate property. Speaking of section 1, sub-section 2, of the Imperial Act, which corresponds with section 2 sub-section 2 of ours, Lord Esher remarks: "The section limits the capacity of the married woman to bind herself by the words, 'in respect of and to the extent of her separate property.' It is clear that she is not given an unlimited capacity to enter into and be bound by, any contract."

The Court expressly approved of the decision of Pearson, J., in *In re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169, that "according to the true construction of the Act, the contract which is to bind separate property must be entered into at a time when the married woman has existing separate property. If she has such property her contract will bind it."

Judgment.

OSLER,  
J.A.

And the separate property must be property with respect to which she may be reasonably deemed to have contracted: *Leak v. Driffield*, 24 Q. B. D. 98; *Braunstein v. Lewis*, 7 Times L. R. 566.

"The damages recovered are not to be payable by the married woman; they are to be payable out of her separate property. \* \* This section really imposes a new liability on a married woman at law, which will produce the same result as was before the Act produced in equity. In equity the decree was that the sum found due should be charged on the married woman's separate estate, and the same effect is, as it seems to me, given by the Act to an action at law as was before the Act produced in equity by a different process." *Per* Lord Esher, *Scott v. Morley*, 20 Q. B. D. at p. 126.

The first question then, to be here decided, is whether there was evidence of a contract on the part of the married woman defendant to assume payment of the defendant Wilkie's mortgage to the plaintiff on the Manitoba lands. Apart from the conveyance to her, I think there is no evidence of such a contract. The power of attorney to her husband conferred upon him no authority to enter into an agreement to exchange her lands, much less to bind her to assume payment of a mortgage on land taken in exchange, nor is there any evidence that she adopted, or even knew of, the contract he had made, or that the conveyance which she executed of her property was by way of performance on her part of such a contract.

Then as regards the deed to herself of the Manitoba land, she has not executed it, and even if she was *sui juris* the right of Wilkie to indemnity would under similar circumstances depend, not upon contract, but upon the equitable obligation independent of contract, said by Lord Eldon in *Waring v. Ward*, 7 Ves. at p. 337, to be imposed upon the purchaser to indemnify the vendee against his personal obligation to pay the money due upon the mortgage, for that having become the owner of the mortgaged estate he must be supposed to intend to



indemnify the vendor against the mortgage. But in the case of a married woman who has entered into no contract of this nature, we have been referred to no authority to shew that the obligation implied by equity in the absence of contract in the case of persons *sui juris*, can be enforced against her separate estate, in other words, that her separate estate will be made liable as if she had expressly contracted to assume and pay off the mortgage. Her power to contract is enlarged by the recent Act, but in the absence of contract, express or implied, it is difficult to see on what ground the equitable obligation referred to can be laid hold of and applied so as to support a judgment charging her separate estate.

Judgment.

OSLER,  
J.A.

I refer to *Ambrose v. Fraser*, 14 O. R. 551, at pp. 554, 555.

The vendor is not without remedy, since if he pays off the mortgage he is entitled to an assignment of it, and to stand in the shoes of the mortgagee: *Kinnaird v. Trollope*, 39 Ch. D. 636.

It thus becomes unnecessary to decide whether the Court below was right in holding that the land in Manitoba conveyed to the married woman by the defendant Wilkie was separate property for the purpose of supporting a judgment against her in favour of Wilkie. The onus is upon him to prove the existence of such property, and even if we could assume that the law of Manitoba as to the property of married women is similar to that which has been so recently adopted by us (Wharton on Conflict of Laws, 2nd ed., secs. 771-4; Foote on Foreign and Domestic Law, pp. 121, 130, 167; Lawson on Presumptive Evidence, pp. 370-9) I should require to consider further the question whether real property in a foreign country, which is subject to the *lex loci*, and not as in the case of personal property to the law of domicile, can be said to be separate property for the purpose of supporting a judgment against a married woman here. *Primâ facie*, I should be disposed to hold that the separate property which would support such a judgment against her, upon her contract, must

Judgment.

OSLER,  
J.A.

necessarily be such as could be, or might have been, charged by such judgment.

The record in this case is wrongly constituted. *Campbell v. Robinson*, 27 Gr. 634, which was relied on, was a foreclosure action. (a) But here the plaintiff had no cause of action whatever against Mrs. Morton. The alleged agreement between her and Wilkie to assume and pay off the mortgage is not one of which the plaintiff can take advantage. There is no privity between them and she ought not to have been made a defendant. And even if Wilkie could have had relief against her under any circumstances in an action against him on his covenant it should not have been by way of a direct order to pay him the amount of this mortgage debt and interest. At the utmost his right would be to be indemnified by her against any loss he might sustain in consequence of his being himself obliged to pay the mortgage, or to a decree ordering and directing her to pay it, to neither of which remedies is he however entitled in the present case, for the reasons already given.

The proper form of a judgment against a married woman is given in *Scott v. Morley*, 20 Q. B. D. at p. 132. It would appear to be now settled that it ought to follow the words of the Act, and is not to be a general judgment *quod recuperet*.

MACLENNAN, J. A. :—

[The learned Judge stated the facts as above set out and continued:]

The objection does not seem to have been taken, or if so was not pressed, that in a case like the present no judgment could be given in favour of one defendant against another. If it had I am of opinion that it must have been fatal.

The plaintiff's claim against Mrs. Morton was properly

(a) See the observations of Strong, J., on this case in *Williams v. Balfour*, 18 S. C. R. 479, 480.

dismissed. He had no legal or equitable claim against her for payment of the mortgage debt, no matter what the agreement might have been between her and Wilkie. Nor was there any ground in this action for adjusting the equities between the defendants, as there was in *Campbell v. Robinson*, 27 Gr. 634, for the present was a mere action of covenant not of foreclosure as it was in that case. If the Court was asked to take this land away from Mrs. Morton to satisfy the debt either by foreclosure or sale as well as for the personal judgment against the defendants, it would then be necessary and proper to give relief to Wilkie as well as to the plaintiff; for when Wilkie pays the debt the land becomes his security as against Mrs. Morton. The present however, is a mere common law action and is governed by Consolidated Rule 328 and following rules, as to which it has been decided that no actual relief can be administered under them, between co-defendants. See *Holmsted and Langton*, Jud. Act p. 362, *et seq.* and cases cited; *Horwell v. London General Omnibus Co.*, 2 Exch. D. 365; and *Lockie v. Tennant*, 5 O. R. 52. The alteration of the corresponding English Rules of 1875 made in 1883, has not been adopted in our procedure.

It was always the rule in Chancery to give as between co-defendants all the relief which their respective equities arising out of the plaintiff's case entitled them to, as stated by Lord Eldon in the House of Lords in *Chamley v. Lord Dunsany*, 2 Sch. & L. at p. 718, referred to by the late Chief Justice Spragge in *Campbell v. Robinson*, 27 Gr. 634. But that was confined to the case of defendants who were proper parties to the suit as between them and the plaintiff, because they were concerned in the relief sought by the latter. Here Mrs. Morton is no wise concerned in the plaintiff's money demand against Wilkie, and as between the plaintiff and her, the statement of claim was demurrable. The only pretence for making her a defendant is Rule 328, and the decisions under that Rule shew that there can be no judgment against her in favour of her co-defendant.

I am, however of opinion, with great respect, that

Judgment.

MACLENNAN,  
J.A.

Judgment. putting aside this objection, and supposing it to have been  
**MACLENNAN,** waived, the judgment of the Divisional Court cannot be  
**J. A.** maintained, and that the judgment of my learned brother  
**MACMAHON** ought to be restored.

The liability of Mrs. Morton is put on the ground that she contracted to pay the mortgage debt and that she did so with reference to her separate property. Mr. Justice ROSE puts it thus at p. 745: "Mrs. Morton took a conveyance of the land, subject to the mortgage. The estate vested in her; the \$2,000 were paid;—that it was by exchange of lands seems quite immaterial, see *Seney v. Porter*, 12 Gr. 546—surely she had separate estate with respect to which she might reasonably be deemed to have contracted."

Now if there was any contract it must be found in one or other of the two conveyances. Mrs. Morton's conveyance was a conveyance of lands for a sum of money subject to certain mortgages. There is clearly no covenant or contract in that to pay the plaintiff's mortgage. Wilkie's conveyance to her was a conveyance of land in Manitoba subject to the plaintiff's mortgage on the same land. There is no evidence and we cannot assume, that Manitoba land can be held by a married woman for her separate use. But assuming it can, there is no express agreement on her part in the deed. It was not executed by her, and I am not aware of any authority for the proposition that a grantee of land subject to a mortgage becomes liable to pay the mortgage or to indemnify the grantor as upon a contract of any kind. As I understand the authorities the principle on which the obligation of a purchaser to pay off a mortgage rests in such a case is an equitable one, and not contract. This is fully explained by Lord Eldon in *Waring v. Ward*, 7 Ves. at p. 337. He says: "If (the purchaser) enters into no obligation with the party, from whom he purchases, neither by bond nor covenant of indemnity to save him harmless from the mortgage, yet this Court, if he receives possession, and has the profits, would, independent of contract, raise upon his conscience an obligation to indemnify the vendor against the personal obligation to



pay the money due upon the vendor's transaction of mortgage; for, being become owner of the estate, he must be supposed to intend to indemnify the vendor against the mortgage."

Judgment.

MACLENNAN,  
J. A.

See also *Thompson v. Wilkes*, 5 Gr. 594, and *Re Cozier, Parker v. Glover*, 24 Gr. 539, and also the recent judgment of the Chancellor in *Ambrose v. Fraser*, 14 O. R. at p. 553, in which he quotes the language of Kindersley, V. C., in *Wright v. Chard*, 4 Dr. 673, who said that a plaintiff who seeks to charge the separate estate of a married woman must make out at least some contract or engagement with him on her part. To the same effect is *Pike v. Fitzgibbon*, 17 Ch. D. at p. 462, where Brett, L. J., uses this language: "The decisions come to this that *certain promises* \* \* made by a married woman \* \* will be enforced against (her) separate estate." I also refer to *Wainford v. Heyl*, L. R. 20 Eq. 321, in which Jessel, M. R., expressed his understanding of this rule to be that the married woman, or rather her separate estate, is liable to make good all contracts which are made by her with express reference to the separate estate, or what from the nature of the contract itself must be intended to be so referred; but she is not liable even for general contracts which from their nature cannot be so referred, and *a fortiori* not for general torts. In other words there must be a *contract*, or as Lord Esher preferred to express it, a *promise*, expressly or impliedly referring to separate estate. I do not see how an obligation imposed by a Court of Equity, on the grounds stated by Lord Eldon, can be described as or held to be a contract or promise.

The true principle on which the doctrine of a married woman's liability seems to rest is, as it appears to me, that having the right to deal with and dispose of her separate property as if she were a feme sole, there must be found in her contract or promise an intention express or implied to exercise that right, and unless that can be found there is no obligation, the act is void.

The statute of 1884, the Married Women's Property Act, has declared that the word "*contract*" shall include a breach

Judgment. of trust, or devastavit by her as a trustee or executrix or  
MACLENNAN, administratrix, and declares that every *contract* entered  
J.A. into by her shall be deemed to have been made with respect to her separate property unless the contrary is shewn. The language used in this statute shews very clearly that the liability has always been and still is confined to cases of contract, except the new cases to which it is now extended, and even in cases of contract it may still be shewn that it was not entered into with reference to the separate estate.

The pleading and the evidence as to the existence of separate estate are exceedingly vague, uncertain and unsatisfactory, and the judgment might perhaps be rested on the absence of such evidence. But I prefer to rest my judgment on the ground that there was no proof of any contract or promise by the appellant by which as a married woman she could be legally bound in respect of her separate estate.

*Appeal allowed with costs.*

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## IN RE TOWNSHIPS OF ROMNEY AND TILBURY WEST ET AL.

*Drainage—Municipal corporations—Municipalities interested—Constitution of board of arbitrators—R. S. O. (1887) ch. 184, sec. 389.*

Where in a drainage scheme initiated by one township, assessments are made against more than one other township, each township is “interested,” within the meaning of section 389 of R. S. O. (1887) ch. 184, only in the question of its own assessment; and on appeal from the assessment, the arbitration provided for by the Act is one between each appellant township and the initiating township, not a joint arbitration between the latter and all the other townships assessed.

The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved the attempted charge fails and is not to be re-imposed elsewhere.

*Re Townships of Harwich and Raleigh*, 20 O. R. 154, approved.

*Re Essex and Rochester*, 42 U. C. R. 523, questioned.

Judgment of ARMOUR, C. J., reversed.

THIS was an appeal by the Township of Romney from Statement. the judgment of ARMOUR, C. J., dismissing a motion to set aside an award.

A drainage scheme was initiated by the Township of Tilbury West, by which the Townships of Tilbury East, Romney, and Mersea, were alleged to be benefited, and these townships were severally assessed for portions of the cost of the work. The Township of Romney was dissatisfied, and at its instance an arbitration was held, each township appointing an arbitrator, and an award was made. From an order of ARMOUR, C. J., dismissing a motion to set aside this award there was this appeal, which came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 22nd and 26th of May, 1891.

Many objections to the validity of the award were urged, but the only one that it is necessary to notice was one taken for the first time in this Court, viz.: that the board of arbitrators was improperly constituted, in that the townships other than Romney and Tilbury West were not “interested” in the question of Romney’s assessment, and were not entitled to appoint an arbitrator to deal with the question of that assessment.

Judgment. *C. R. Atkinson*, Q. C., and *C. J. Holman*, for the appellants.  
HAGARTY, C.J.O. *W. R. Meredith*, Q. C., *W. Douglas*, Q. C., and *J. A. Walker*, for the respondents.

June 30th, 1891. HAGARTY, C. J. O. :—

On this appeal an objection was taken to the constitution of the board of arbitration on the ground that the dispute was between Romney and the initiating township of Tilbury West, and that Tilbury East and Mersea should not have appointed arbitrators.

The other municipalities argue against this objection, and insist that they had a right to be represented, their contention being that the cost of the work being a definite and fixed sum, any reduction in the assessment of one or more townships must of necessity be added to the assessments of the others.

Romney's original appeal was on the ground that many of its lots were not benefited in comparison with lots mentioned in the assessments in Tilbury East and West, and it was urged that the total amount charged to Romney should be greatly reduced, and the total charged to Tilbury West increased, and the other assessments against the roads and lands in the other townships increased or at least varied if necessary as the case might appear.

This objection as to the constitution of the board of arbitration is formidable, and may be first considered.

Assuming for the present that this scheme was properly initiated by Tilbury West, and that lands in the other three municipalities were properly assessable, we must examine the provisions of the statute.

When the report and by-law of Tilbury West was served on each of the other three municipalities, the proceedings became governed by section 581. Within twenty days from its receipt the council may appeal therefrom, and serve the head of the corporation from which they receive the report with notice of appeal, stating the grounds and the



name of an arbitrator "and shall call upon such corporation to appoint an arbitrator" within ten days after service of notice.

Judgment.  
HAGARTY,  
C.J.O.

Section 579 directs the initiating municipality to serve the report, assessments, etc., on the municipality into which the work is to be continued, or lands benefited, "and unless the same is appealed from, as hereinafter provided, it shall be binding on the council of such municipality."

Section 580 binds the latter within four months to pass a by-law to raise the necessary money named in the report or determined by the arbitrators.

Each township then must appeal if dissatisfied, otherwise it is bound.

Tilbury East and Mersea were satisfied, and did not appeal.

Romney exercised its right to appeal, and under the provisions of the Act I think the contest necessarily was only between it and Tilbury West, the initiating township, the other two townships being satisfied, and merely bystanders, interested, no doubt, in the result which might be the defeat of the whole project, if Romney, assessed for over a-fourth of the whole cost, succeeded in getting discharged or in having the assessment materially reduced.

I think it is impossible to justify the intervention of a non-appealing township in the arbitration under the statute.

It does not in any way follow that because Romney be substantially relieved of the large sum assessed as its share, that an increased burden necessarily falls on the non-appealing townships. Practically such a result would be the defeat of the whole project of Tilbury West.

It is not easy to see on what grounds Mersea or Tilbury East could have appealed. They had to say whether they were satisfied or dissatisfied with the amount charged against them. They were satisfied in reference to the whole scheme of assessment, therefore they said nothing. The non-appellants could not, in my opinion, in any event, be entitled to representation in an arbitration required by Romney.

Judgment.

HAGARTY,  
C.J.O.

The learned Chancellor in a recent case of *Re Townships of Harwich and Raleigh*, 20 O. R. 154, adopts this view of the proper parties to an arbitration between municipalities. I refer to his remarks on the cases of *Re Essex and Rochester*, 42 U. C. R. 523, and *Dover v. Chatham*, 11 A. R. 242; 12 S. C. R. 321; in this Court, and again in the Supreme Court.

The first of these cases was under an earlier statute. If there be anything in its extended remarks supporting the respondents' contention in this case, I must respectfully dissent.

I agree that the remarks of Gwynne, J., in the Supreme Court, are adverse to the respondents. "The bulk sum for the whole work is borne by the initiating municipality, and the others contribute only so much as represents the actual benefit received by them which can fairly be attributable to the work. If benefit be disproved the attempted charge fails entirely and does not reappear to be imposed elsewhere."

I think the present case strongly illustrates the force of the contention that the contest here should justly be wholly between the initiating township, the proposers and authors of the whole scheme, and Romney, on whom so large a share of the cost was to fall. It was against the assessment and judgment of their engineer that Romney contends, and it seems hard that it is by the voices of the two other municipalities, whose interest certainly does not lie in reducing Romney's assessment, that the question is to be decided.

I do not purpose in this case to discuss the effect of the sections from 598 onwards, as to the intervention of the county or counties where the municipalities assessed lie in different counties; or whether the proper course in a case like this might have been to have proceeded under these sections. They first appeared in the Act of 1882, 45 Vic. ch. 26 (O.)

They certainly provide for a far more extended and fairer ascertainment of the wishes and views of the parties

who are assessed than where, as here, the proceedings are initiated in a township municipality.

Under the circumstances of this case I see no reason for withholding costs.

Judgment.

BURTON,  
J.A.

BURTON, J. A. :—

If the objection raised for the first time before us be well taken, the proceedings were *coram non judice*, and we cannot avoid giving effect to it.

The decision in *Re Essex and Rochester*, 42 U.C.R. 523, has been always regarded with a good deal of doubt, but this is the first occasion on which this question has been brought before us for adjudication. It proceeded upon the idea that if the sum charged against one of several municipalities by the engineer for benefit was reduced, the other municipalities assessed for benefit were liable to have their amounts increased to make up the deficiency, in the same way as a readjustment becomes necessary in the event of any change being made in some one or more of the assessments in the Court of Revision, but this idea is, I think, manifestly erroneous; the benefit which one municipality receives cannot vary because a mistake has been made in the amount of benefit received by another.

The other municipalities assessed for benefit were interested simply in their own assessment, and if they complained were each entitled to have a reference to arbitration; but they had no interest in the dispute between Romney and Tilbury West, and had no right therefore to be represented in an arbitration to fix Romney's proportion to be contributed to Tilbury West for the benefit it derived.

The appeal therefore should be allowed, but as the objection was raised here for the first time, it should be without costs.

OSLER, and MACLENNAN, JJ.A., concurred with HAGARTY, C. J. O.

*Appeal allowed with costs.*

## REGINA V. SLOAN.

*"Liquor License Act"—Right of search—Refusal to admit officer—R. S. O. (1887) ch. 194, sec. 130.*

The right of search given by section 130 of the "Liquor License Act," R. S. O. (1887) ch. 194, may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient.

Judgment of the County Court of Frontenac reversed, OSLER, J.A., dissenting.

## Statement.

THIS was an appeal by the Attorney-General for Ontario from an order of the Judge of the County Court of Frontenac, quashing a conviction by the Police Magistrate of Kingston, under the "Liquor License Act."

William Glidden, inspector of licenses, on the 14th of October, 1890, laid an information against the defendant Sloan, a licensed tavern-keeper, for having failed to admit him when demanding admission to one of the apartments of the premises of the defendant, on Sunday, 21st September, 1890, while in the execution of his business or duty.

On this, Sloan was summoned and appeared, and, after evidence taken, was convicted.

The evidence of the inspector shewed that he was license inspector; that the defendant was a licensed tavern-keeper; that on Sunday, the 21st of September, between four and six o'clock, he demanded admission into a particular room that was locked, which he pointed out to the defendant, "as license inspector in the execution of my duty;" that the defendant said he had not the key; that the inspector asked if he refused to admit him; that he would only say that he had not the key, and the inspector left.

The defendant, in his evidence, declared that he had not the key, but admitted that he made no effort to get admittance into the room, and had made no inquiries about the key.

On behalf of the defendant, it was objected that no offence had been committed, as the inspector had not



specified for what purpose he wanted to enter the room in *Statement*. the execution of his duty.

The conviction was "for unlawfully failing to admit William Glidden, license inspector for the city of Kingston, to one of the apartments of said tavern, the said William Glidden at the time demanding to enter such apartment in execution of his duty," with the usual formal averments.

On appeal to the Sessions the conviction was quashed, the County Court Judge holding that the purpose for which the inspector desired to enter should have been stated by him.

An appeal was brought by the Attorney-General under the provisions of 52 Vic. ch. 15 (O.), and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 27th of May, 1891.

*J. R. Cartwright*, Q. C., for the appellant.

*John McIntyre*, Q. C., for the respondent.

June 30th, 1891. HAGARTY, C. J. O.:—

[The learned Chief Justice stated the facts as above set out and continued:]

I feel difficulty in agreeing that the statute requires proof beyond what was offered to the Police Magistrate. Under section 130 of R. S. O. (1887) ch. 194, the inspector may, for the purpose of preventing or detecting the violation of any of the provisions of the Act which it is his duty to enforce, at any time enter into any and every part of any inn or tavern \* \* and may make searches in every part thereof \* \* as he may think necessary for the purpose aforesaid.

Sub-section 2. Every person \* \* who refuses or fails to admit such \* \* inspector "demanding to enter in pursuance of this section in the execution of his duty" \* \* shall be liable, etc.

In this case it is proved that the inspector formally demanded admittance to the rooms in question "as license inspector in the execution of his duty."

Judgment.

HAGARTY,  
C.J.O.

His character and office were stated and that in execution of his duty he required admittance.

As it appears to me he was entitled to such admittance and the offence was complete under the statute.

I cannot see why I should add to its requirements by holding it necessary for him either to state that he had received any information of some unlawful proceedings in the house or that he of his own accord suspected something illegal was being carried on in that room.

The language of this section seems identical with that of section 16 of the Imperial Act, 37-8 Vic. (1874) ch. 49.

The learned Judge speaks of the Act as giving an authority unusual and extreme.

It is, doubtless, an arbitrary enactment. But we must remember that such has been for many years the necessary character of enactments for the prevention of fraud and evasions of the provisions considered proper for the regulation of taverns and places of public entertainment—such as Acts to prevent fraud on the revenue.

Persons who enter on the profession of tavern-keeping do so with full knowledge of the special provisions to prevent illegal acts on their premises. For instance, as to Sunday trading—the tavern might be ostensibly closed yet the business secretly carried on inside. They know that the law permits these domiciliary visits by the inspector. He may have private information which he is not bound to disclose. He may merely be acting on his own observation or suspicion arising from observation. I cannot agree that he is bound to do more than exhibit or declare his official character and require admission in the execution of his duty as he did here.

I think the Legislature intentionally dispensed with other formal announcement by the officers. To require the officer always first to state his precise object in requiring to enter a room in a tavern might much assist the suspected innkeeper in avoiding detection.

We have heard or read of many of the means years ago resorted to in such a case. For example, when it was dis-

covered or suspected what the object of the revenue or excise officer's visit was, on a previously arranged signal valves were opened and vats emptied of their contents.

Judgment.  
HAGARTY,  
C.J.O.

In these days of improved electrical signals we can easily fancy the advantage to be gained by requiring the formal announcement or declaration of the express purpose for which the entry was demanded.

I think these enactments are made designedly strict and apparently arbitrary in their provisions. The cases to be dealt with require this rigour.

Mr. Cartwright referred us to Stone's Justices' Manual, 23rd ed., 1885, p. 417. Section 16 of the Imperial Act is there noted, and the note *f.* cites a case of *Regina v. Dobbins*, 48 J. P. 182: "A constable *bonâ fide* inspecting a licensed house to prevent or detect violations of the provisions of the Act is entitled to admission although he may not have any special ground of suspicion of an actual offence." The report of this case is not to be had here.

He also cited a case of *Regina v. Tott*, 30 L. J. M. C. 177, but it is under an earlier statute, 4 & 5 Wm. IV., ch. 85, sec. 7, which allows the officers to enter "as often as they shall think proper."

In Paterson's Licensing Laws, 6th ed., (1885), p. 141, the section is given, and it is remarked: "Though under this section the constable seems not bound to give special reasons to the licensed person before entering a licensed house, yet in case of dispute as to the right of entry, he will not be justified without being able to shew some reasonable ground to the Court for thinking that the statute was about to be or had been violated. And on proving the offence in the second paragraph (as to failing to admit) the constable must allege and prove some reasonable ground for entering. If, however, the constable says he wants to see if there was anything wrong in the house, as he was going a round of visiting all the licensed houses, this will be deemed a sufficient reason for demanding entry," citing *Regina v. Dobbins*, 48 J. P. 182.

In Mew's Consolidated Digest, 1884-1888, the note of

Judgment.

HAGARTY,  
C.J.O.

*Dobbins' Case* is, that the police constable demanded entry, the sole reason given being that he wanted to visit the house. \* \* In point of fact, the constable's object was to inspect all the licensed houses to prevent or detect offences, but he had no special ground of suspicion. Held, that the conviction could not be set aside if the justices were satisfied as to the bonâ fide intention of the constable to prevent violation of the Act.

I incline to think that is the most correct summary of *Dobbins' Case*. As to the Justices being satisfied with the good faith of the officer's intention, there is no suggestion here of any imputation of bad faith, and there is certainly nothing in the evidence to lead to any other conclusion.

I can see no difference worth discussing between the officer demanding admittance saying that he wanted to inspect the house, or that he was on a course of visiting all the houses, or that he wanted admittance for the purpose of preventing violations of the Act, and his saying, as here, that he demanded admission as a license inspector in the execution of his duty. If there be such difference I am unable to understand or appreciate it.

I think the appeal should be allowed and the conviction upheld.

BURTON, and MACLENNAN, JJ. A., concurred.

OSLER, J. A. :—

This appeal ought, in my opinion, to be dismissed. The section under which the constable acted is section 130 of the "Liquor License Act," the terms of which are nearly identical with those of section 16 of the Licensing Act, 1874, 37 & 38 Vic., ch. 49 (Imp.).

I should myself have been disposed to agree with the view of the learned Judge of the County Court, that at the very least an inspector or constable should, when demanding to enter, say that he wishes to enter for the purpose



mentioned in the section, namely, for the purpose of preventing or detecting a violation of the Act, that being the only purpose which can justify his action. But as it is said that the section of the Imperial Act has not had that construction placed upon it (*Regina v. Dobbins* 48 J. P. 182, the report of which, however, we cannot see; and *Harrison v. MacL' Meel*, 50 L. T. N. S. 210), my decision rests upon the other ground taken below in reversing the conviction of the Police Magistrate, a ground which the note of *Dobbins' Case* given in Patterson's Licensing Laws, p. 141, fully supports, viz., that though under this section the constable *seems* not bound to give special reasons to a licensed person before entering a licensed house, yet in case of dispute as to the right of entry he will not be justified without being able to shew some reasonable ground for thinking that the statute was about to be or had been violated. And on proving the offence in the second paragraph (sub-section 2 of section 130) the constable must allege and prove some reasonable ground for entering. "If, however, he says he wants to see if there was anything wrong in the house as he was going a round of visiting all the licensed houses this will be deemed a sufficient reason for demanding entry." This I infer was the reason given in *Dobbins' Case*, as the author vouches it as his authority for the statement in the text, and if so the bald headnote given in the Digest of the report in the J. P. is probably inaccurate.

In my humble opinion there is not, with deference to my learned brothers, the slightest evidence to raise suspicion in the mind of any constable acting in a reasonable manner, and not merely wishing to exercise his right of entry arbitrarily.

[The learned Judge commented upon the evidence and continued:]

He was not in the execution of his duty unless there was some reason to suspect a violation of the Act then past or present, and of the existence of such a reason I think he gives no evidence.

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J. A.

I quite agree that taverns are not castles, and that a very necessary right of search is properly conferred, but this must be exercised in a reasonable and not in an arbitrary manner. Before a man is visited with a heavy penalty it should be made reasonably clear that the constable was right in his method of proceeding, and that there is something more tangible in the case than the mere suspicion of an officer, too zealous to draw fair inferences from what he sees, or too ready to exert authority, and resent opposition. I am obliged to say that I think he was acting here in an unreasonable and arbitrary manner, and that the conviction was justly set aside.

*Appeal allowed with costs, OSLER, J. A., dissenting.*

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## IN RE CENTRAL BANK OF CANADA.

## HOME SAVINGS AND LOAN COMPANY'S CASE.

*Banks and Banking—Shares—Transfers—Winding-up-Act.*

After a winding-up order has been made it is too late for holders of shares, entered as such in the books of the bank, to escape liability by showing irregularities in transfers to more or less remote predecessors in title.

A loan company which advances money on the security of shares, which are transferred to it, and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower.

Judgment of ROBERTSON, J., affirmed.

THIS was an appeal by the company from the judgment of ROBERTSON, J., who dismissed their appeal from the report of the Master in Ordinary, placing them on the list of contributories of the Central Bank of Canada in the winding up thereof in respect of fifteen shares. Statement.

The company were incorporated by letters patent, and the purposes of incorporation were thus set forth :

“Firstly. To enable the company to lend money on the security of real estate in the Province of Ontario, or upon the security of the public securities of the Dominion, or of any of the Provinces thereof, or upon the security of the stock, shares, debentures, or bonds, of any municipal or other corporation or incorporated institution, or of any chartered bank, doing business in Ontario, upon such terms and conditions of repayment as may be lawfully agreed upon with the borrower or borrowers, and to invest money in the purchase of any of the said securities, and to resell any of such securities, or sell or transfer any security upon which a loan may be made with right of sale, and for that purpose to execute all necessary instruments and to lend and invest as aforesaid both the capital of the said company, and any money that may be borrowed by the said company on their debentures, or on cash loans or otherwise.

“Secondly. To enable the said company to act as an agency association, and in their own name or in the name and

**Statement.** on behalf of others who may entrust them with money for that purpose, to lend and invest money in and upon securities aforesaid, and upon terms and conditions of repayment that may be lawfully agreed upon, and to guarantee the repayment of either the principal or interest or both of any moneys intrusted to the said company for investment, and when acting as an agency association to charge such commission to the lender or borrower or both upon the moneys invested and as may be agreed upon or as may be reasonable in that behalf."

The letters patent contained also the following extract from the general Act:—

"No company shall use any of its funds in the purchase of stock in any other corporation unless expressly authorized by the by-laws confirmed at a general meeting."

The by-laws contained the usual provisions that the affairs of the company should be under the control of a board of five directors, who should choose from among themselves a president and vice-president, that all assignments, acceptances or releases of securities should be signed by the president (or in case of his absence by the vice-president) and the manager; and that the seal of the company should be affixed by the manager to such instruments as might require it and as the board might determine. There was also the following special by-law:

"No. 47. That those persons who now have or hereafter shall have power to transfer or accept shares or stocks of any kind held or to be held by the company or by the company in trust, be and are hereby authorized to so transfer or accept by and through any attorney or attorneys, substitute, or substitutes to be by them appointed."

The fifteen shares in question were acquired by the company as security for a loan on the 26th of September, 1887, and were transferred to them in the share transfer book of the bank, in the usual form, the acceptance in the usual form being signed, "The Home Savings and Loan Company in trust by its attorney, James Mason." Mason was the manager of the company, and his evidence was that in



taking this transfer he was acting with the knowledge and approval of the board of directors. On the 26th of October, 1887, within thirty days of the date of the winding-up order, the company transferred ten of the shares, the transfer being signed "The Home Savings and Loan Company; Frank Smith, President, and James Mason, Manager, by attorney, Robert Cochran." The other five shares were held by the company at the time the winding-up order was made.

The Master-in-Ordinary held that the company were liable as contributories in respect of the fifteen shares; his ruling being affirmed by ROBERTSON, J., and the appeal of the company from that affirming judgment came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 1st and 2nd of June, 1891.

*Foy*, Q. C., for the appellants.

*W. R. Meredith*, Q. C., and *F. A. Hilton*, for the respondents.

A large number of objections were urged by the appellants, most of them however of the same nature as those already disposed of in connection with the winding up of this bank in *Baines's Case*, 16 A. R. 237; and *Nasmith's Case*, 18 A. R. 209. It is necessary to mention for the purpose of this report three objections only, viz.: (1) that the company could not hold shares at all; (2) that they held them as security merely and as trustees, and were not themselves liable; (3) that the shares in question had no legal existence.

As to the last point it was shown that the shares in question were part of a block of 300 shares transferred by one Allen, then cashier of the bank, to one Stayner; Allen at the time being the nominal holder of a large number of shares which the directors of the bank had subscribed for "in trust for such persons as may desire to subscribe for stock," the intention being to comply (nominally at all events) with the statutory requirements as to the amount of stock

Judgment. to be subscribed for before the bank could commence  
HAGARTY, business. There was no other subscription than this; but  
C.J.O. the shares were sold and dealt with as if validly issued.

June 30th, 1891. HAGARTY, C. J. O. :—

The defendants became assignees of the stock held by Stayner. The transfer to him was made by Allen, and he was entered in the bank books, and accepted by the bank, as a stockholder, and received dividends upon the stock.

I think it impossible to contend that he would be permitted in liquidation to contest his liability. Both he and the bank would between themselves be precluded from denying his ownership of the stock.

It was urged before us that even so, his assignee might question his right to hold.

I cannot agree to this. He had a complete title unchallenged by any one, and could assign such title to another. The defendants seek to go back to the origin of this stock, and to urge that it was not regularly issued or accepted. It was stock which within the charter the directors could lawfully assign to shareholders in proper form. They do not properly follow the ordinary form or course but either by direction from them, or by virtue of numerous transfers of stock from holders to Allen, the latter professed to assign. I hardly see how Stayner could challenge the transfer to him. There was such stock in existence available for purchasers, and it was assigned to them.

If the appellants' argument be sound it might follow that if half of the shares issued—say \$250,000—had been thus irregularly assigned to purchasers, who had been entered as shareholders in the bank books and had acted as such, and either they or their assignees had received dividends thereon, they yet could ultimately escape liability to the creditors in liquidation. I cannot believe that such a result could be possible, thus throwing the responsibility on the creditors of shewing a lawful issue in the original acquisition of the

stock, and a flawless regularity in every transfer down to the liquidation.

Judgment.

HAGARTY,  
C.J.O.

Whether these shares were among those assigned to Allen for sale by actual holders, or whether they were part of the large quantity said to have been taken up by the provisional directors, and transferred by Allen under their orders will not, in my opinion, affect the title of the defendants through Stayner, or of Stayner himself. Counsel arguing on behalf of a shareholder, held as a contributory in an insolvent company, are too ready to confound the plain distinction between suits between a shareholder and the company as to a right to be removed from the register, or to resist calls, and the claims of creditors in liquidation proceedings. A very different rule is applied in cases of the latter kind.

As it was shewn that defendants took this stock by way of mortgage security, the objection as to its being beyond their legal right to deal in such property fails.

As to the form in which the stock was transferred to and accepted by them, Mr. Mason's evidence shews clearly that all was done with the knowledge and sanction of the board of directors; and within the thirty days of the winding-up order they made a transfer to Cochran of part of the shares.

I think the appeal must be dismissed.

OSLER, J. A.:—

I think the appeal should be dismissed. The defendants are shareholders as mortgagees, and the Bank Act does not exempt from liability persons or corporations who hold shares in that character, and their own charter expressly enables them to lend money upon the security of the shares of any chartered bank doing business in Ontario.

Their title to the shares in question is traceable directly to Stayner, whose holding was of validly issued shares: out of those, namely, which the directors had subscribed for (with

Judgment.  
OSLER,  
J.A.

whatever object), and upon which they had paid the ten per cent. deposit.

These shares, Allen, with the consent of the directors and of the bank, was disposing of,—the latter were indeed under the circumstances trustees of them for the bank,—and the bank recognized his act and issued a certificate to Stayner acknowledging that he was the holder.

Stayner was accepted as a shareholder, and was paid, and he received, dividends thereon. He had title two ways: by contract and by estoppel; and this covers the whole ground except as to the formalities respecting the acceptance by the contributories of the shares in question. As to this the evidence is that they expressly recognized the act of Mason their secretary, and have adopted it and treated themselves as shareholders.

We have nothing to do with the requirements of their by-laws in this respect, for the bank have recognized the transfer and accepted them as such.

MACLENNAN, J. A.:—

I also think the appeal fails.

The company had power to lend money upon bank shares, and it follows that they had power to take and hold the shares as security for their money.

I think too that the contention that the shares in question had no existence altogether fails. At the time of the transfer by Allen to Stayner of 300 shares on the 5th and 17th of August, 1886, Allen had 50 shares of which he was an original subscriber, and he had also 71 shares, parcel of 80 transferred to him by Barrett. And he had also authority from the directors, who subscribed on the 10th of January, 1884, to deal with the shares subscribed by them on that day.

Whatever may be said of the 50 shares and the 75 in consequence of the contention that the ten per cent. had not been paid in due time it is clearly proved by Mr. Trees, that the ten per cent. was duly paid on the shares,



several hundred in number, subscribed on the 10th of January, 1884, and that their subscriptions became valid and capable of being dealt with by the parties. The resolution in pursuance of which that subscription was made was that the shares so subscribed for should be transferred pro rata to any persons who could be found to take them. Under these circumstances Allen sold 300 shares to Stayner, who paid his purchase money to the bank, and the bank entered him in their books as the holder of the shares, and paid him two dividends thereon.

It would have been more formal if the transfer to Stayner had been from the actual subscribers or some of them, or if there had first been a transfer from the subscribers to Allen. But I think it was competent to the bank to waive that, and to accept Stayner as the owner of the shares, and to put his name in the list of shareholders and to pay him the dividends. After all that had taken place, I think it is clear that Stayner had all the rights and liabilities and status of a legal shareholder, and that a title derived through him cannot be questioned.

It is admitted that the shares in question are parcel of the shares owned by Stayner, and our judgment in *Baines's Case*, 16 A. R., 237, shews that the subsequent transfers were sufficient.

BURTON, J. A., concurred.

*Appeal dismissed with costs.*

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Judgment.  
MACLENNAN,  
J.A.

## IN RE TOWNSHIPS OF ORFORD AND HOWARD ET AL.

*Drainage—Municipal Corporations—Drain used by another municipality—  
R. S. O. (1887) ch. 184, sec. 590.*

Section 590 of R. S. O. (1887) ch. 184 applies only to drains strictly so called, that is, to such outlets as have been artificially constructed, and a municipality from which surface water flows, whether by drains or by natural outlets, into a natural water-course, cannot be called on to contribute to the expense of a drainage scheme, merely because the natural water-course is used as a connecting link between drains constructed under that scheme, and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural water-course by the municipality in question.

Judgment of ROBERTSON, J., affirmed, BURTON, J.A., dissenting.

Statement.

THIS was an appeal by the township of Howard from the judgment of ROBERTSON, J., allowing with costs a motion to set aside an award, and came on to be heard before this Court [HAGARTY, C.J.O., BURTON, OSLER, and MACLENNAN, JJ. A.] on the 18th of March, 1891.

The McGregor creek was a natural water-course rising in Howard or perhaps further east, and running westerly through Howard and Harwich in succession, and emptying into the Thames near the town of Chatham. It is the means by which an extensive area of these townships was drained before any artificial means were used. In the course of the clearing of the forest, the settlement of the country, and the improvement of the farms, the water arising from rainfall and melting snow now finds its level much more quickly than formerly; and the result is intensified by extensive artificial drains, which have been constructed in the area referred to, all leading the water into the natural water-course, the McGregor creek. The effect of all these causes was found, as far back as 1868, to be that in times of high water the creek overflowed its banks in Harwich and the westerly part of Howard, and injured the adjacent lands. In that year the township of Howard, under the drainage clauses of the Municipal Act, enlarged the channel of the creek for some distance in Howard and Harwich, on the petition and at the expense of certain landowners,

whose lands were benefited thereby. In 1887, by a judgment of the High Court, at the instance of some land-owners, it was declared that the township had done the work of enlarging and improving the creek in an imperfect and negligent manner, and the judgment ordered the township, at their own expense, to complete the work, as originally intended, and within a reasonable time to make a proper outlet for the waters brought down by all the drains emptying therein, so as to have them carried away through the said creek.

Thereupon the township passed a by-law for this purpose, under the drainage clauses, and the engineer was directed by the resolution of the council, to assess the municipalities, companies, and individuals in the municipalities of Orford and Ridgetown, using the said creek or drain, as an outlet, or who were thus benefited thereby.

The engineer accordingly assessed the township of Orford and landowners therein for a certain proportion of the cost of the works referred to; and the question was, whether that assessment was legal.

*M. Wilson, Q. C.*, for the appellants.

*W. Douglas, Q. C.*, and *J. A. Walker*, for the respondents.

June 30th, 1891. OSLER, J. A.:—

I am of opinion that the appeal should be dismissed.

Orford is the most easterly, Howard the central, and Harwich the westerly and lowest of the three townships. Howard is the township which originated the work. The work proposed to be done under the by-law commences in that township at a point on McGregor creek, about four miles distant from the township of Orford. It is continued several miles through Howard, and thence into the township of Harwich also for a distance of several miles. No part of it is in Orford. McGregor creek mentioned in the by-law, and in the course of which the work in question is done, is a natural water-course which rises in Orford and flows into and through Howard and Harwich.

Judgment.

OSLER,  
J.A.

Section 590 of the Municipal Act as amended by 52 Vic. ch. 36, sec. 37, and 53 Vic. ch. 50, sec. 37, provides for two classes of cases :

1. If a drain already constructed or hereafter constructed by a municipality is used as an outlet by another municipality, company, or individual for the drainage of improved or unimproved lands : and

2. If any municipality, company, or individual by any means causes waters to flow upon and injure the lands of another municipality, company, or individual, then

The municipality, company, or individual using such drain as an outlet or causing waters to flow upon and injure such lands may be assessed in such proportion or amount as may be ascertained by the engineer, surveyor or arbitrator under the formalities (except the petition) provided in the foregoing sections of the Act

(a) For the construction and maintenance of the drain so used as an outlet ; or

(b) For the construction and maintenance of such drain as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.

The present case is one in which it is attempted to fix upon Orford a liability in respect of the use of outlet. I think there is no reasonable ground for saying that anything has been done by that township to which the second branch of the section 590 can be applied, or that the by-law passed by Howard, under which the arbitration has taken place, can be regarded as one for the construction of a drain to carry off waters which Orford *had caused to flow upon and injure* lands in that township within the meaning of the Act.

The question then is, what is meant by using a drain as an outlet, so as to render the municipality, company, or individual using it, liable to be assessed " for a proportion " of its construction and maintenance ?

The two cases provided for by the section are perfectly distinct, and before the powers conferred in the first case can be brought into play, there must have been a drain



constructed under the Act, a drain which is of course itself an outlet for, and made for the purpose of carrying off, the waters in the area which was intended to be drained by it, and which is benefited thereby and taxed for its construction.

Judgment.

OSLER,  
J.A.

That drain so made must then have been used for the purpose of outlet, or as an outlet, by another drain.

The object was to prevent one municipality, company, or person (as the Act expresses it) from taking advantage of a drain then already, *i.e.* at the time the Act was passed, or thereafter constructed by another municipality, without contributing to the cost. In this respect the section is the same as section 32 of the "Ontario Drainage Act," R. S. O. (1887) ch. 36. No authority is given, as I read the section, to construct a drain in the first instance for outlet purposes and charge the cost of construction upon a municipality, company, or person who may not desire to use it. Again, I think it is only when the one drain is directly used for the purpose of outlet by another that the section applies. It was not intended that it should be applied to the case of drains in a distant section or large area of country, whose waters, from the natural trend or fall of the land, must find their way, composed as they are of the commingled waters of numerous drainage areas, to the lowest drain which is the ultimate point of discharge for them all.

Every drain into which another drain is made to flow is an outlet and used as an outlet for it, and unless the application of the section is limited to a case of that kind, which comes within its express words, the whole of a multitude of drainage areas may be taxed for outlet purposes for as many drains as exist between the water-shed and the point where the waters of all are ultimately discharged. The language of the section in the two cases it provides for points to a direct and intentional user of a particular drain or of causing waters to flow upon and injure defined or definable lands. In the one case the municipality which uses the constructed drain of another merely as an outlet

Judgment.

OSLER,  
J.A.

may be assessed for a proportionate share of the cost of the construction of a drain so used. In the other the municipality may be assessed for the cost of the construction of the drain necessary to carry off the waters so flowing upon and injuring the very lands overflowed in the lower municipality by waters directly brought upon those lands by another drain.

It was very much pressed upon us by Mr. Wilson that there must be power to construct a drain for outlet, or to construct for benefit and charge for outlet, in the first instance, as there was no means whereby the proportion of the cost of construction of a drain used for outlet could be applied in relief of those persons assessed for benefit. But as it is conceded that the section covers the case of a drain already constructed and paid for, that difficulty, if it be one, is no argument in support of the power to construct for outlet in the first instance.

The power to assess for use of outlet is something entirely different from the power to assess for benefit derived from construction under sections 575 and 576. There, the upper municipality in the one case and the lower in the other constructs a drain which benefits lands in the adjoining municipality by draining them, and the area so drained is liable to be assessed for benefit under those sections. Assessment for outlet is another charge which may be imposed upon lands already sufficiently drained by the drain which directly benefits them and for the construction of which they are assessed but for the purpose of which drain and procuring an outlet for it the municipality which has constructed it has taken advantage of the work of another municipality. That is one of the cases which section 590 is intended to provide for.

In the present case the waters of Orford would naturally flow into Howard as being the lower township and they do so for the most part through the natural stream or water-course known as McGregor's creek. If Howard, for its own purposes and to get rid of the water which naturally flows into it, deepens and straightens McGregor creek,

it cannot in my opinion be said that Orford uses that creek as an outlet within the meaning of this section so as to entitle Howard to impose upon the upper township a part of the cost of the work which Howard finds it necessary to do within its own boundary and in the lower township.

Judgment.

OSLER,  
J.A.

So with regard to the waters of the Stover drain which Howard contends are discharged into McGregor creek at a point in Howard above where the work in question begins. The Stover drain was constructed by Orford, and the area benefited by it, and assessed for its construction, is partly in Orford, partly in Howard. It discharges into the Crouch drain, a work wholly within the township of Howard, and that drain discharges into McGregor creek.

The only drain which can, I think, be regarded as the outlet of the Stover drain within the meaning of the section is the Crouch drain, and McGregor creek cannot be said to be used as an outlet for the Stover drain merely because the waters of that drain ultimately reach it through another drain.

In short, if Howard's contention is maintainable, every one of the drainage areas in the upper municipality, the waters of which ultimately find their way into McGregor creek, may be twice taxed for outlet; once by Howard and once by or for each of the drains into which the waters of their own drainage areas immediately discharge.

But further, assuming that there is evidence that might have justified the engineer in reporting, and the arbitrators in confirming the report, in respect of a drain constructed for the purpose of conveying away from lands in Howard or Harwich waters which Orford had within the meaning of section 590 "caused to flow upon and injure such lands," though I am myself of opinion that there is no such evidence, yet, the assessment being single, in respect of one entire scheme, but made up partly for benefit, partly for outlet, and partly for relieving lands injured by waters cast upon them by Orford, and no distinction being made as to lots assessed for benefit, injury, or outlet, I think that the whole must fail when it is shewn that one element

Judgment.

OSLER,  
J.A.

of the assessment, that namely for outlet purposes under the first part of this section 590, is not under the circumstances warranted by that section. Both classes of drains mentioned in that section may be said to be outlet drains, the difference being that one is used, or taken advantage of as such, by or for the purposes of another drain of later construction, for which the latter, when it does so, must pay. The other is a drain constructed for the express purpose of conveying away water thrown by one municipality upon lands in another.

There are other grounds on which the judgment may be supported. One is, that which the learned Judge below relies on—namely, that section 590 does not apply to the case of a natural water-course, such as McGregor creek. If, <sup>Mr</sup>Howard, for its own purposes, and to get rid of water for which that creek is the natural outlet and discharge, finds it necessary to enlarge and deepen the creek, I think they cannot invoke section 590 for the purpose of casting upon Orford any part of the cost of the work, which is not within its borders, and which clearly does not benefit it in any degree.

The constitution of the board of arbitrators, seems also to be fatal to the award. As I read the statute, the arbitration should have taken place between Howard and Orford only, each appointing one arbitrator, with a third to be appointed by the two or by the County Judge. There is, I think, no warrant for a final arbitration between all the municipalities affected by the scheme. The right or power to assess must be fought out between the originating township on the one hand, and the particular municipality affected and objecting on the other: Sections 579, 580, 581, 582.

MACLENNAN, J. A. :—

I am of opinion that this judgment ought not to be disturbed, for the reasons expressed by the learned Judge in his judgment, to which I have but little to add.



[The learned Judge stated the facts as above set out and continued :]

Judgment.

MACLENNAN,  
J.A.

It is not, and could not, be pretended that any lands in Orford, are or could be benefited either by the work which was done, or intended to be done, either under the by-law of 1868, or that of 1887, for the reason that Orford lay so far away from the work, and at a so much higher level, that its drainage was not affected thereby. The nearest part of the work in question is between three and four miles from the boundary of Orford, and the difference of level is very considerable. There was no assessment of any lands in Orford for the work of 1868, which there would have been, if there was any ground for supposing that the drainage of Orford lands would be improved by that work.

The condition of affairs in Orford when the by-law in question was passed, was that the inhabitants had used the McGregor creek freely for drainage purposes, but the whole of the water which flowed into it from that township reached the creek some distance above the work done under the by-law, with the exception of a drain called the Stover drain, which emptied into a drain in Howard called the Crouch drain, and which in its turn emptied into the McGregor creek, at a place where it was deepened and improved under the by-law.

The contention of the appellants is that inasmuch as the waters of Orford, on their way to the sea, pass through the part of the McGregor creek improved under the by-law, certain lands in Orford are liable to contribute to the expense of the improvements, by virtue of sections 576 585, 590, or 592 of the Municipal Act or some or one of them.

I think it is perfectly clear that section 576 affords no support to the contention, for that section only authorizes the assessment of lands to be benefited.

Section 585 must also be excluded, for it merely dispenses with the necessity for a petition in certain cases, and everything else must be done under sections 569 to

Judgment. 582, which only permit the assessment to be made upon the property to be benefited by the work.

MACLENNAN,  
J.A.

It is however upon section 590 that the appellants place their chief reliance, and it is upon this section that the engineer expressly states that his assessment against Orford is founded, and it remains to be considered whether this section supports the contention. This section authorizes assessment in two cases: First, if a drain constructed by a municipality is used as an outlet by another municipality, company, or individual, the latter may be assessed for the construction and maintenance of the outlet: and second, if a municipality, company, or individual by any means causes water to flow upon and injure the lands of another municipality, company, or individual, the former may be assessed for the construction and maintenance of any drain or drains necessary to carry off the water from the injured lands.

I do not think the township of Orford comes within either of these two cases. I do not think it uses a drain constructed by Howard as an outlet within the meaning of the section. It is true the water from Orford ultimately comes to the drainage works in question, but the greatest part of it passes first through several miles of a natural water-course, which they always had a legal right to use; and the rest passes through several miles of another drain, called the Crouch drain, which discharges into the respondents' drainage works. In my judgment the only outlets used by Orford are the McGregor creek, which is a natural water-course, and not a drain constructed by the respondents, and the Crouch drain, which is no part of the works for which contribution has been assessed. Whatever claim there might be for contribution for the maintenance of the Crouch drain, by those who constructed the Stover drain, I think it clear no such claim can be made upon them for the works in question.

The section says that the assessment is to be in such proportion and amount as may be ascertained by the engineer. How is he to ascertain the proportion and

amount? It must be according to the degree of benefit. Judgment.  
 Without the Crouch drain, presumably there was no outlet MACLENNAN,  
 for the Stover drain, and the former work was therefore J.A.  
 beneficial to the same persons who constructed the latter.  
 They had to find an outlet, and if there was no natural  
 one, they must make, or get the right to use, an artificial  
 one, and it is right they should contribute. But when  
 they get to the McGregor creek, they get an outlet which  
 they have a right to use, and they have no further concern  
 with the water when it has reached that point. I think  
 that by the common law it is the right of every land-  
 owner to drain his land into any natural water-course  
 accessible to him. Indeed, it is the principal function and  
 purpose which a water-course serves, to carry off to great  
 lakes or to the sea, the surplus precipitation from the  
 atmosphere, whether rainfall or melted snow, beyond what  
 is required to support vegetation, and to supply the needs  
 of mankind; and I think that while the landowners exer-  
 cise their rights reasonably, whether they do so individ-  
 ually or collectively, they are not concerned with the effects  
 produced lower down the stream: *Rawstron v. Taylor*, 11  
 Exch. 369; *Broadbent v. Ramsbotham*, *ib.*, 602; *Miner v.*  
*Gilmour*, 12 Moo. P. C. at p. 156. See also the "Ditches and  
 Water-Courses Act," R. S. O. (1887) ch. 220, which has been  
 in force since 1834.

Then is the present within the second case provided for  
 by the section? I am of opinion that it is not. The town-  
 ship of Orford is not causing water to flow upon or injure  
 the lands of Howard, or of any company, or individual.  
 They have conducted their surplus water to a natural  
 water-course; that they had a right to do. If some miles  
 further down that stream, there is an overflow, I do not  
 see how Orford can be said to have caused it. It would be  
 just as correct and as reasonable to say that the inhabitants  
 of Orford cause the floods which annually alarm the citi-  
 zens of Montreal, because the waters from their township  
 ultimately find their way down the St. Lawrence and help  
 to swell its tide.

Judgment.

MACLENNAN,  
J.A.

If I am right in the conclusion that the sections I have named do not authorize the assessment, it follows that no more does section 592, for that section merely directs that the money required to answer a judgment or comply with an award shall be charged pro rata upon the lands and roads liable to be assessed therefor.

I think the appeal should be dismissed.

HAGARTY, C. J. O. :—

I agree that our decision must rest on our construction of section 590, and after much consideration and some hesitation I agree with my learned brothers who have read their opinions, that the claim against Orford cannot be supported on the language used in that section.

Is this “a drain constructed by a municipality?” There is power given to deepen or straighten any stream, creek, or water-course or to construct a drain for draining any property. It is clear, I think, that if a drain or work constructed by a township for its own purposes be used by another township, company, or individual as an outlet, the parties so using may be assessed to contribute.

This seems to point at some artificial drainage work, hardly to a stream or water-course, the outlet provided by nature for drainage. The words are: “If any municipality, company or individual \* \* causes waters to flow upon and injure the lands of another municipality, company, or individual, the municipality, company, or individual using such drain as an outlet or otherwise, or causing waters to flow upon and injure such lands, may be assessed in such proportion and amount as may be ascertained by the engineer,” etc.

I am hardly able to apply these words to the people of Orford. How are they using this Howard work four miles away from them as an outlet? They are draining, as they always have done, into the natural creek. They are not actively causing waters to flow on to Howard or into Howard's drains.



I admit, that if Orford had by their action collected the waters of their township, bringing them up to or near the Howard line, and Howard made a drain within this line into which the Orford waters flowed, the latter township lands from which such collected waters flowed might be assessed for benefit if the Howard work drained their land of water that would otherwise have remained to their injury. But if the water so collected did not flow into Howard to its injury, there would be no benefit to Orford from the Howard work.

Judgment.

HAGARTY,  
C.J.O.

No one denies that if one township by any action on its part causes water to flow into another and the latter drains it away they can assess.

How is the assessment under these words in the section to be made? Its proportion and amount may be ascertained by the engineer under the formalities, except the petition, provided \* \* and he may assess for the construction and maintenance of the drain so used as an outlet as aforesaid; or for the construction and maintenance of any drain that may be necessary to carry off the waters so caused to flow upon and injure the lands.

All this seems to me to point to acts done or to be done by Orford to use the Howard improvement of the creek as an outlet, or secondly, to acts in themselves causing water to flow injuriously on Howard lands. Then and in such cases, without a petition, Howard can initiate proceedings for assessment purposes. The power to do so without a petition seems to me to point to the event of a future actual user or causing water to flow, etc., not to the assessment here made on a petition.

Again, under the words used, if they cover the use by Orford of its natural water-courses as a township, it would seem as if the township and not any named lots should contribute. A company or individual causing water to flow on the lands of another company or individual, etc., may be assessed. These words seem to make the municipality liable as a company or individual would be. I gather from the evidence that the assessment here made is evidently

Judgment.  
HAGARTY,  
C.J.O.

against Orford as a whole. The surveyor is asked: "As I understand, you simply assess Orford for the extra cost of this work over what it would cost to make equally effective drainage without adding the precipitated water from Orford?" and he answers "As if they had not meddled with nature at all."

As I understand this answer, Orford incurs this liability by the simple agricultural improvements of her inhabitants in the ordinary cultivation of their land, using the natural water-course provided by this creek, and in favour of work four miles away done by the lower township, to make this water-course more efficient.

I hardly think that the Legislature intended to make a township like Orford, thus using its natural advantages of position in the manner sanctioned by the common law, liable to the cost of a work miles away in another municipality, and undertaken solely for the benefit of its own low lying lands, and wholly unnecessary in the drainage of Orford.

On this reasoning the townships below Howard might equally claim contributions from all townships above them, if they thought it for their advantage to further deepen and straighten this McGregor creek.

It is not without hesitation that I venture to construe this section. Whatever may have been intended, I cannot persuade myself that the language used fixes this liability upon this township. As was said of a statute within the last six months by the present Master of the Rolls: "I do not wonder at the difficulty that has arisen in this Act. People who draw Acts of Parliament, knowing themselves what the meaning of them is intended to be, are apt to forget that those who have to construe them, do not know what is in the mind of the draftsman. The difficulty arises in this case from different words having been used in different sections of the Act, when perhaps the same thing was meant."

On the whole, I think that no case has been made to fix Orford with this liability.

BURTON, J. A. :—

Judgment.

BURTON,  
J.A.

I am unfortunately unable to agree with my learned brothers in the construction they place upon section 590; and although under these circumstances I feel naturally inclined to distrust my own judgment, that feeling of distrust is considerably diminished when I find that practical men like the engineer employed in this case, together with the arbitrators and the members of the council, men resident in these drainage districts, and who have had much experience in the working of the system, and presumably in seeking from time to time the amendments in legislation which were found to be necessary to make the law efficient, have arrived at the same conclusion at which I, scanning the Act with the eye of a lawyer, and with such aids only as are legitimately resorted to in construing an Act of Parliament, have also come.

I cannot concur in the view that the McGregor drain is not a drain already constructed by a municipality, within the meaning of section 590; it was an artificial work, and it cannot lose its character as a drain merely because for a considerable distance it was constructed in the general course of the McGregor creek; it was constructed by the authority and under the provisions of the drainage Acts, and to it all the provisions of the drainage Acts apply, and to exclude it because it happens in part to have the advantages of a natural cut or lead, would, as it seems to me, be to legislate, not to interpret. If the Legislature intended to have such a restricted interpretation placed upon the words, they would have said, "but this section shall not apply to drains which in part consist of, or use the waters of, a natural creek, stream, or water-course"; but apart from the literal meaning of the words, I think I shall be able to show that such a case as this was intended to come within this section in order to meet the difficulties which arose from time to time in the carrying out of the system, working great injustice to individuals, for which previous to the passing of that section, there was no

Judgment.

BURTON,  
J.A.

remedy, or none which threw the burden upon the parties who in justice and equity should be called upon to bear it.

The first portion of the section applies to such a drain being used as an outlet by another municipality, company, or individual, and the case of the Stover drain constructed by the township of Orford conveying waters of that township first into the Crouch drain and then into the McGregor drain, that is to say, into the artificial work constructed by Howard, seems to me to fall expressly within the language of that portion of the section and to give a plain right to assess Orford in respect of it. I do not of course for a moment assume that parties could be assessed in respect of an outlet for water which naturally flowed into the drain thus constructed from the upper part of the same water-course. Such a construction would be opposed not only to the letter of the statute but to common sense; but it is a very different matter when water is brought from another part of the upper township which would never have found its way naturally unto the stream improved or unimproved; in such a case it becomes a matter of no importance whether the drain was an original water-course or not.

“If any municipality, company, or individual *by any means* causes waters to flow upon and injure the lands of another municipality, company or individual, the municipality, company or individual \* \* causing waters to flow upon and injure such lands may be assessed in such proportion and amount as may be ascertained by the engineer, surveyor, or arbitrators, \* \* under the formalities \* \* provided in the foregoing sections, for the construction and maintenance of such drain or drains as may be necessary for conveying from such lands the waters so caused to flow upon and injure the same.”

It is said that this can only apply to cases in which the offending municipality, company, or individual is actively throwing water upon the lands of the other municipality, company, or individual. But why should such a forced construction be placed upon these words? I am free to admit



that such a case might fall within the enactment so as to authorize an assessment, but no legislation was required in such a case ; the suffering individual or municipality would have an action for or might obtain an injunction against such an injury. If words of that kind, referring to some tortious act of that nature, had been inserted in the Act, which had gone on to say "or by any other ways or means whatever," could it admit of the slightest doubt that all the parties would have to do would be to show that waters which would not otherwise have flowed into McGregor creek were made to accumulate within the township of Orford either by that municipality or some company or individual, and brought into that creek in such increased volume that they were unable to escape even with the increased facilities afforded by the improvement of the McGregor creek and the works upon it, and to flow upon the lands in Howard so as to injure them ? I must confess I should have thought not, and I find it difficult to suggest words which would more suitably convey the meaning of the Legislature, as I interpret it, than those they have employed. And when I come to the facts alleged here and upon which the necessity of the by-law is based, I think the case is brought not only within the enactment but the justice and propriety of such an Act is made apparent and the desirability of construing it in the most liberal manner which the language will bear established.

What is alleged is, that after the making of the McGregor drain, various and other drains were made in the township of Orford, carrying waters which would not otherwise have come there into the McGregor creek, and surcharging the same and the drain from it, and causing waters to flow upon and injure the lands of the municipality of Howard, and of various individuals and companies therein.

If the McGregor creek had been left by Howard in a state of nature, and had been left also by Orford as it was originally, it is quite possible that there would have been no overflow into Howard at all ; but if, as the wit-

Judgment.

BURTON,  
J.A.

Judgment.

BURTON,  
J.A.

nesses say, at least four times the quantity is now brought into the McGregor creek by new drains made in Orford by the municipality and by the resident farmers and the Canada Southern Railway, which in consequence flow over and injure lands in the other township, how can it be urged with any reason or without doing violence to the plain language of the statute, that it is not *by these means* that this overflow and injury has been caused? If so, it is not important to consider whether the McGregor drain is a drain owing its paternity to the municipality or not. The township may, in order to remove the injury complained of, construct another drain, whose legitimacy will be beyond question, and assess the township of Orford, its inhabitants, and the companies within it, for its construction. What distinction can be drawn between a drain thus constructed for the purpose of carrying off those waters and enlarging a present drain, even though that drain in a portion of its course uses the bed of a natural water-course? The by-law recites that a judgment had been recovered in the High Court for damages sustained by reason of an overflow, and in order to comply with the judgment and to construct such a drain as will be sufficient to prevent a repetition of the injury, and at the same time carry off the water which has been caused to flow by the municipality of Orford, it was expedient that an examination should be made in the terms of the statute and a by-law passed.

The engineer in his report, states that at the head of the drain a number of branch drains coming down through Orford into the township of Howard, come into the creek and thence into the McGregor drain, and at stake twenty-eight the Crouch drain enters, in all draining about 5,240 acres of land in Howard, and 2,525 acres of land in Orford, exclusive of the Canada Southern Railway Company's land in both townships, about 18 acres in each; and he proceeds to show that he has fully appreciated the distinction between those lands which he has assessed for benefit and those for outlet, and those assessed upon the municipality or individuals, for having caused waters to flow upon

and injure lands in Howard, and the additional expense for providing an outlet for such waters.

Judgment.

BURTON,  
J.A.

There is some confusion caused by the use of the word "benefit," which is not to be found in this section, and which has no application to cases within it. All that the engineer has power to do—all that he has professed to do—is to charge Orford when it has used the McGregor drain as an outlet for its waters, with its share of the additional expense of enlarging the drain, which he might have accomplished by ordering the construction of a new drain in order to carry off the waters which it is alleged Orford has caused to flow upon lands in Howard. He did not pretend that the new work was any benefit to Orford, nor assess upon any such principle.

We are not concerned, as it seems to me, as to whether, if nothing had been done in improving the McGregor creek, any liability would have rested upon Orford by bringing large quantities of water from a distance as they have done into the creek, so as to cause it to overflow the lands in Howard. I may concede at once for the sake of argument, that there would have been no liability; that is not the point before us. The Legislature has had to deal with a large and intricate system of drainage which has proved of incalculable value to a large section of country. Orford has profited to a very large extent by draining into the creek, and I do not for a moment doubt that the artificial works erected in connection with that creek have added great facilities to the getting rid of that water. And I have no doubt upon the evidence that but for them the waters would have flowed over and injured the lands in Howard to a much greater extent than they do at present, and as at present advised I think it highly probable the Howard people would have been without remedy and would have had to construct the drains to carry off such water at their own expense.

That might have been the law but would it have been justice? And it was to remedy this injustice that the Legislature has interfered, and I must confess I see no difficulty

Judgment.  
BURTON,  
J.A.

in placing upon the Act the interpretation which the parties affected have placed upon it.

I think it is shewn that the Orford people have interfered with the creek as it was in a state of nature, by bringing a number of drains into it. That they have also carried the water from the road ditches into it, and that the farmers along its banks to a considerable distance from the stream itself have by under-draining brought a large addition to the waters which originally flowed in the creek. This additional water the creek itself in a state of nature would not have been sufficient to carry off, and even as improved and enlarged by the works in Howard is unable to do so, and it is by this means that the waters are caused to flow partly by the municipality, partly by individuals, and partly by the Canada Southern Railway Company upon the lands in Howard.

The engineer is asked: "Suppose that the extra quantity of water which Orford sends down over what would go down to Howard in a state of nature were cut off, so as to leave (*sic*) the water from Orford from going down but just as it would go in a state of nature; what, if any difference would it make in the expense of such a work as would do the same benefit and make the same outlet for the other lands as your work intends to make with the water now coming through Orford? I consider that it would be made so much smaller as to strike off the assessment against Orford; that is the principle on which it was figured up.

Do you believe that your estimate is correct? I do.

As I understand you simply assess Orford for the extra cost of this work over what it would cost to make equally efficient drainage, without adding the precipitated water from Orford? As if they had not meddled with nature at all."

This view does not appear to have presented itself to the learned Judge, who proceeds entirely on the ground that Orford did not require the drain, and that if the McGregor creek had never been meddled with by Howard



the people damaged by what has occurred in Orford would have been without remedy. That is probably so, but we are not dealing with any one's rights at common law, but with what are the rights of people in Howard under this statute. I think it was a very reasonable and proper provision to make, that if the land is injured from such a cause as is here complained of, necessitating the making or enlarging a drain to remove the evil, the party causing the evil should be assessed for it. I think I am not hazarding a very rash conjecture if I assume that some at least of the damages for which the township of Howard has on previous occasions been mulcted were attributable to this cause; and although that would not have warranted the including those damages in this by-law and assessing them against Orford, it was a course probably to which in equity and good conscience they should not have objected; and I do not wonder at the engineer originally including it.

Judgment.

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 BURTON,  
J.A.

I think the assumption that Orford is assessed as a whole is a mistake; that is not the case; individuals and the Canada Southern Railway as well as the municipality are included in the assessment for their proportions of the damage respectively caused by them; and as to the supposed difficulty of apportioning the assessment, that would apply equally with a drain as to the character of which as a drain constructed by the municipality there was no question and if given effect to would render the enactment a nullity.

There may be some difficulty in apportioning it, but as the parties do not appear to have appealed to the Court of Revision it may be fairly assumed that the engineer has not experienced the difficulty suggested.

I think the case falls within section 590 and that the assessment of the engineer was correct in principle which is all we are concerned with.

I think, therefore, that the appeal should be allowed.

The question of the constitution of the board of arbitrators was not raised upon the argument and it seemed to me fair to assume that the two arbitrators who should

Judgment. probably have constituted the board were unanimous, and  
 BURTON, that being so their award was not the less valid because  
 J.A. others also signed it.

*Appeal dismissed with costs, BURTON. J. A., dissenting.*

### TOWNSHIP OF STEPHEN V. TOWNSHIP OF MCGILLIVRAY.

*Drainage—Municipal corporations—Adjoining municipality—Appeal against scheme—R. S. O. (1887) ch. 184, sec. 576.*

An adjoining township cannot be charged under section 576 of R. S. O. (1887) ch. 184, with a proportion of the cost of drainage works which extend beyond the limits of the initiating township into the limits of a third township. It is only, if at all, when the works are done by a county council under the appropriate provisions of the Act that an adjoining township can, under such circumstances, be assessed.

*Per OSLER, and MACLENNAN, JJ.A.* Objections to the legality of a drainage scheme may be taken by way of appeal under the arbitration clauses of the Act, but they need not necessarily be so taken, and it is not too late to set them up in answer to an action.

Judgment of ROSE, J., affirmed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of ROSE, J., dismissing with costs an action brought to recover a portion of the cost of a drainage scheme initiated and carried out by the plaintiffs, and the appeal came on to be heard before this Court, [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 20th and 21st of May, 1891.

The facts are stated in the judgments.

*Moss, Q. C., and M. Wilson, Q. C., for the appellants.*

*W. Nesbitt, and A. W. Aytoun-Finlay, for the respondents.*

June 30th, 1891. HAGARTY, C. J. O.:—

The township of Stephen in the county of Huron, on a petition from certain parties, passed a by-law for draining part of the township of Stephen. This was passed on the

report of McCand, a surveyor, on a plan for opening a cut across a sand bar into Lake Huron of the river Aux Sables at a bend, and dredging the river to a point some 200 or 300 chains distant up the stream, to a junction of the Haycock creek in Stephen. This river forms the boundary between Bosanquet in the north, and Stephen and McGillivray in the south.

Bosanquet is in the County of Lambton. The scheme involved an assessment on lands in Stephen and Bosanquet, and also on lands in two other townships, McGillivray and West Williams, both in the County of Middlesex.

The surveyor says: "As the work will further be an outlet for portions of Bosanquet, McGillivray and Williams, and the lands therein, and will be necessary to carry off the water caused to flow therefrom to or upon the said locality in Stephen, I have assessed and charged said townships and lands therein, for a just proportion, etc., for construction.

The total cost was about \$21,000.

On Bosanquet .....	\$ 4,342
On McGillivray.....	10,590
On Williams .....	30
On Stephen .....	6,500

The usual proceedings were taken and notice given to each township.

The defendant township, McGillivray, took no notice and did not appeal.

This action is for a mandamus to compel the defendants to pass a by-law to raise the amount assessed.

The defendants deny liability, and say that no portion of the works extend into them; that the report shews no benefit to the defendants' lands; that the petition did not come from any property owners in the defendants' township, and that the by-law was without authority.

The nearest part of the proposed works on the Aux Sables, is many miles (ten to fifteen) distant from McGillivray.

Judgment.

HAGARTY,  
C.J.O.

Judgment.HAGARTY,  
C.J.O.

The main objection is, as found by the trial Judge, that the work was not one within the jurisdiction of a township, but it should have been initiated by a county.

Here there are four townships in three different counties.

In 1882, by 45 Vic. ch. 26, certain amendments were made in the drainage laws, as to works affecting more than one municipality, on account of the works passing through the two or more municipalities; or the deepening or raising waters of a stream or lake, either draining or flooding lands, and it was provided that the county council of the county to which they belong, might intervene and do the work; and when the municipalities on whom the expense is to fall, are in different counties, either county could do the work, with large provisions for carrying it out, etc.

These clauses appear in the general Municipal Act of the following year, 1883, with enlarged powers, and appear in the Revised Statutes of Ontario of 1887, ch. 184.

Section 598 is as to the works affecting more than one municipality as passing through two or more, or by raising or lowering the waters of a stream or lake, either draining or flooding lands in two or more townships, and then the county council may, on application of either, proceed to do the work without petition.

The county (section 599) is to raise the necessary money, but each township is liable for the amount assessed thereon.

Section 600. In case the municipalities upon which the cost of the works would fall, are in several counties, any of the counties may procure examinations by an engineer, procure plans and statements of the lands to be benefited, and any municipality may indemnify the county for the expense of works not proceeded with.

Section 601. The council, after deciding to proceed, shall have the report published, etc.

Section 602. In case ten owners of the properties assessed, petition against the work, the council may pass a by-law for taking the votes of all parties assessed, with



directions for holding the polls in each municipality affected either within or without the county.

Judgment.

HAGARTY,  
C.J.O.

Section 603. If the vote be in favour of the work, or if there be no petition against it, the council of the county or counties upon which two-thirds of the cost will fall, may serve on each of the other counties a requisition of appeal, etc.

If there be no appeal in thirty days, they are deemed to accept.

If dissatisfied, the council served may give notice of appeal, and arbitrators are to be appointed by each county, etc.

Section 604. The arbitrators are to determine the proportions of the cost to be borne by each of the minor municipalities.

Section 607. Any of them may appear by counsel or agent in support of or for any variation in the proportion for which they are assessed.

Section 608. In case more counties than one are concerned, no by-law for assessing the cost shall be passed until after the time for appeal is passed or after award made.

Section 609. Then each county shall pass a by-law to raise the sum chargeable against each county, etc., and for assessing the same in accordance with the proportion fixed in the report; and for the appointment of a court for trial in the first instance of complaints against the assessment, as hereinbefore provided, in case of a county which is solely interested.

This points to sub-section 2 of section 598, where one county only is interested; there it is said: The court to be held for the trial of complaints in the first instance shall be composed of three or more persons, nominated by the county council for that purpose, etc., who are to adjudicate upon any complaints. The engineer or surveyor who made the assessment shall not be a member of the Court of Revision.

Under these clauses, first appearing in 1882, a far more just and liberal and effective method of ascertaining the

Judgment.

HAGARTY,  
C.J.O.

views of the parties interested is provided; and one far more in accordance with the general policy and spirit of the municipal Acts.

If, as was argued before us, the township of Stephen could properly start a plan like this, a most startling injustice could be perpetrated. A certain number of Stephen owners joined by some in Bosanquet, being a majority of the owners of certain specified lands, petition, and on that nearly half the cost of the entire work is cast upon McGillivray, a township many miles away, upon lands whose owners had no opportunity of signifying assent or dissent.

On the same principle the surveyor might have assessed hundreds of owners in half a dozen other townships in the county of Middlesex.

The injustice is well pointed out in the case of *West Nissouri v. North Dorchester*, 14 O. R. 294. Seven out of the ten Nissouri owners petition, and a by-law is passed by Nissouri for a drain through it and Dorchester, and thirty-nine land-owners in Dorchester are assessed who had no voice in the matter, but are bound by the petition of the seven Nissouri owners. The action was to compel Dorchester to raise its proportion of cost—\$5,725, while Nissouri's portion was only \$1,345, less than one-quarter of the charge against the not consulted parties.

Galt, C. J., at the trial held that the county council was the proper party to pass by-laws for the purpose, as the work proposed affected both Nissouri and Dorchester, section 598 of the Act of 1883 governing.

His view of the case was confirmed by the Divisional Court; the remarks of Boyd, C., are well worthy of perusal. Ferguson, J., concurs.

The case before us is far stronger than that of Nissouri, and does not require us to adopt to the fullest extent the opinion of the learned Chancellor. His remarks on the violence done to the general spirit of our municipal legislation in permitting such a manifestly unfair result as was sought to be upheld in the case before him, are of ten-fold force when applied to the case before us.

In my judgment the Legislature in 1882 provided a fully competent machinery to govern a case where the municipalities sought to be assessed are in different counties, and a just and sorely needed means of giving parties sought to be charged, a voice for or against the scheme.

I cannot agree that it is left optional to adopt either course. The language used in both cases is only permissive not compulsory. The township may adopt the scheme: so may the county council when applied to.

I read the Act providing two separate courses of proceeding to meet the named circumstances.

Under 'one, if held to apply here, an admittedly gross injustice may be committed. Under the other, all this can be and is prevented. I am prepared to hold that the township of Stephen had no authority to force this scheme on the other townships: that it should have originated with one of the county councils, and that the action was rightly dismissed.

I have no recollection of this point having ever been directly in question since the first introduction of these clauses of 1882.

My brother ROSE considered also, that where the natural stream proposed to be deepened formed the boundary line between the townships, the statute did not meet such a case so as to justify Stephen in initiating this work on petition. There is much force in the objection, but I do not rest my judgment thereon.

If, as in *In re Orford and Howard*, ante p. 496, we had to rest our judgment on the merits of the surveyor's proceedings, or of an award thereon, I think it would be peculiarly difficult to justify throwing nearly half the cost on McGillivray, a township many miles away from the proposed work, merely because its natural drainage was through this river. It is not easy to see how McGillivray can be said to cause water to flow on or injure the lands of Stephen.

The mere ordinary clearing up of the country whereby the water ran off through the natural stream more

Judgment.

HAGARTY,  
C.J.O.

Judgment. rapidly than when the land was in a state of nature, cannot, I think, be a reason for charging that water is caused to flow upon and injure lands lower down, within the apparent intention of the statute.

HAGARTY,  
C.J.O.

BURTON, J. A. :—

Upon the foundation of a petition for the drainage of the comparatively small block of land referred to in it, the engineer has proposed to erect a very large superstructure, but whether in so doing, he and the initiating township have exceeded their powers, it is not necessary, in my view of the case, to consider, and it is very undesirable to express any opinion in these drainage cases except upon the matter actually in issue and essential to the decision of the case.

That question in this case is, not whether the township had the power to construct these works, but whether they have shown any authority for assessing the adjoining township of McGillivray.

They rely chiefly on section 576, but although it is probably a *casus omissus* which the Legislature would on application supply, it appears to me that that section, as at present framed, applies only to assessment for benefit in the adjoining municipality where the works do not extend beyond the limits of the municipality in which they were commenced. It is true, as it strikes me at present, that it is quite immaterial to McGillivray whether those works which are alleged to benefit them, are confined within the limits of Stephen or extend also into Bosanquet, but these statutes imposing burdens upon the public have to be construed strictly, and I think we should be assuming the functions of the Legislature were we to interpret the language of this section as the appellants desire.

I think that is sufficient to dispose of this case, as a considerable portion of the assessment in McGillivray is for benefit.

They also relied upon section 590, and if the objection I have just referred to was not entitled to prevail, a much



more difficult question might arise, because, although I am unable to find upon the evidence anything which, in my opinion, brings the case within that section, either as regards outlet or damages for over-flow, that, I apprehend, would be rather a matter to be dealt with by the arbitrators, subject to appeal, and not by the court in this shape.

Judgment.

BURTON,  
J.A.

If, however, I am right on the other point, this action fails. Whether the case comes within the county council clauses, I offer no opinion ; but I must not be understood from my silence as assenting to the views expressed by some of my learned brothers, that they would have authorized what was done in this case. It is sufficient to say that the plaintiffs have not made out a case for a mandamus.

OSLER, J. A. :—

Some of the grounds on which our judgment in the recent case of *In re Orford and Howard*, ante, p. 496, was rested, appear to me to be decisive of the appeal in this case also.

The petitions upon which the council of Stephen acted do not directly propose a drainage scheme affecting McGillivray under sections 575, 576. The idea was to construct a drain for which the lands in Stephen benefited thereby would be assessed under those sections. But the council, in adopting the petitions, were of opinion that the drain would also make and be used as an outlet for waters coming down from McGillivray, and would carry from the lands sought to be drained, waters caused to flow upon them to their injury from that and other townships. And the reference to the engineer accordingly instructed him to assess for benefit, and also to assess any other township properly assessable under section 590, as well as the other sections.

Under the former sections, I think that the township of McGillivray could not be assessed at all ; not under section

**Judgment.****OSLER,  
J.A.**

575, because the work was not carried into that township; nor under section 576, because the work was not confined to the limits of Stephen, the initiating township, but extended into a lower township—namely, Bosanquet. These sections provide for two cases: one for assessing a lower township for work initiated by the adjoining higher township, where the work is carried into the lower for the purpose of obtaining a fall and outlet; where in so doing it benefits lands in the lower township; the other for assessing the adjoining higher township for work initiated by and confined to the limits of the lower, but which benefits the land or roads of the former.

This, if I rightly understand the engineer's report, is the view he has acted upon in dealing with McGillivray. He has not assessed lands in that township for benefit, but strictly, as I read it, under section 590, for a just proportion of the cost of construction of the work in respect of outlet, and for carrying off waters caused to flow from McGillivray upon the locality to be drained. The schedule of assessment on the McGillivray lands, speaks, it is true, of the nature of the "improvement" of each lot; but that, looking at the body of the report, is only one way of describing the amount assessable against it as its proportion of the cost of construction. If the assessment is to be regarded as an assessment for benefit, the proceeding is *ultra vires* and void on that ground, but I do not so understand the report.

The case therefore turns upon the application of section 590, and for the reason given by me in my judgment in *In re Orford and Howard*, ante p. 496, I think the proceedings of the township are *ultra vires* also, so far as that section is concerned. I do not read it as conferring an original power to construct a drain for outlet purposes. Its object was to prevent municipalities and others from taking advantage of a drain constructed under sections 569, 575, and 576, which other persons had paid or were paying for, without contributing a proportion of the cost; not to confer an original power to construct a drain for outlet as distinguished from

benefit in the first instance. It was intended to reach the case of those whose own drain would sufficiently drain the area taxed for its construction, but who used another drain for the purpose of discharging their own waters. If this was not the object of the section (and the case was one not otherwise provided for) it would be unnecessary, seeing that as regards assessment for benefit, that is to say, for assessing a hitherto undrained area, sections 575 and 576 make (within limits) the necessary provision. I do not think that any of the sections extend to enable a minor municipality to engage in a scheme of such magnitude as has been attempted in the present instance, involving it might be the draining of one or more entire townships for the immediate purpose of getting rid of water naturally flowing therefrom into the lower and initiating township, and brought there moreover, not by a drain constructed under the Act, but by a natural water-course. Waters so brought down are not, I submit, waters caused to flow upon and injure the lower lands by municipalities, companies, or individuals, within the meaning of the section. I express no opinion on the other questions raised in the judgment, which should, I think, be affirmed.

Judgment.

OSLER,  
J.A.

The proceeding being *ultra vires* the township, it appears to me that McGillivray was not driven to arbitration under section 581, though they may not have been precluded from taking that course had they been so minded. Section 579 does not go far enough to fix them with liability in respect of a scheme which the council had not under the section the power to adopt, and which could not therefore have been validated even by an award.

MACLENNAN, J. A. :—

The reeve of the township of McGillivray was duly served with a copy of the report, plans, specifications, assessment and estimates of the engineer on the 9th of August, 1888, but that township never appealed, as provided by section 581 of the Act. The effect of this omis-

**Judgment.** sion is declared by section 579 to be that it became binding  
**MACLENNAN,** on the council of the municipality. The language of this  
**J.A.** section is loose, but I shall assume for the present purpose that it means not only the report but also the plans, specification, assessment and estimates, and that when the section says it shall be binding on the council it means binding on the corporation.

It was contended before us that the defences raised by the respondents are no longer open, not having been raised by appeal to arbitration as provided by the Act.

I think the judgment of the Supreme Court in *Dover v. Chatham*, 12 S. C. R. 321, decides that upon appeal not merely the aggregate amount of the assessment is open but also the validity of the whole proceeding, and of the report and other acts of the engineer; and that the arbitrators may decide in any such case that the report, etc., is illegal and void, and in that case one of the grounds on which the award was held invalid was that there was no proof that the proceeding was initiated by a petition signed by a majority of the persons to be benefited by the work. It would seem to follow that all the objections which are now raised to the plaintiffs' action might have been urged by way of appeal to arbitration, and the first question is, whether, not having been raised in that manner, they can be urged now. It is quite evident the Legislature never intended that unless appealed against, an engineer's report should bind the corporation served with it, no matter how illegal or unauthorized its contents might be; as for example, where there was no petition in cases where petition is required, or where it appeared on the face of the report that he assessed territory not legally liable, or where any other illegality was apparent on the face of the report or assessment. The township when served with a document plainly illegal, might disregard it, and resist in the ordinary way any attempt to enforce it.

I think, therefore, if there is anything illegal in this report, any excess of jurisdiction by the engineer, or by the originating township, it can be relied on as a defence, notwithstanding the omission to appeal by arbitration.



My learned brother ROSE came to the conclusion that the defendant township could not be charged with this work by the plaintiffs under any of the sections of the Act relied on, and that if the work could be done at all, as to which he doubted, it could only be through the instrumentality of the county council under section 598.

In the view I take of the case, it is not necessary to attempt to define particularly what can be done under the several clauses of the Act, for I think the report of the engineer is clearly invalid on its face, in assessing lands in McGillivray for outlet, and for causing waters to flow upon or injure the lands of Stephen, or its inhabitants, under section 590.

When this proceeding was initiated, McGillivray was using as an outlet the Aux Sables river, a natural water-course. In doing so, it was exercising its legal right. If this river sometimes overflowed its banks in Stephen, that was no concern of the people of McGillivray, they were not responsible for it, nor would any action lie against them for it. It was merely the misfortune of the people of Stephen that their lands along the river lay low. If they chose to take steps to make a new outlet for the river, or to deepen it so as to lower the water permanently on that part of it which lay in their township, that could give them no just claim for contribution from McGillivray merely because they drained into it, or because water from their township was part of the water which overflowed the lands of Stephen, when the river was full. It is a totally different consideration when it is a question of benefit. By making a new outlet and deepening the river for two or three miles in the lower part of Stephen, it is conceivable that some low lands in McGillivray would be benefited, and for that the latter would be justly and properly assessable in proportion to benefit. But in the present case, the resolution of the council of Stephen distinctly suggests to the engineer to assess McGillivray for outlet, and also for the removal of water injuriously flowing from that township upon lands in Stephen; and the engineer in his

Judgment.

MACLENNAN,  
J.A.

Judgment. report declares that his assessment has been made for those causes.

MACLENNAN,

J.A.

The justification for this assessment, is said to be found in section 590 ; but I am clearly of opinion that that section does not authorize it. I think it is clear that the river Aux Sables is not, and cannot by any reasonable and proper interpretation of language, be regarded as a *drain constructed*, within the meaning of that section. I have in my judgment in *In re Orford and Howard, ante*, p. 496, explained what I think is meant by a drain used for outlet in this section, and I need not repeat what I there stated. I have also in the same judgment expressed my view of the kind of case contemplated by the Legislature in the other branch of section 590, referring to waters caused by one municipality to flow upon and injure lands in another municipality ; and I need say no more here than that the present is clearly not a case within the section.

The assessment of the engineer does not distinguish in any way between lands assessed for benefit, as some of them may be, and lands assessed for outlet, or for water sent down injuriously ; nor does it appear how much is for benefit and how much for the other causes. Part of the assessment being thus illegal, I think makes the whole void, and the result is, in my judgment, that the action fails, and was properly dismissed.

*Appeal dismissed with costs.*

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## HEWARD V. O'DONOHUE.

*Statute of Limitations—Tenancies in common—Caretaker of one tenant—Partition—Adverse possession as to co-tenants.*

The defendant was placed in possession of certain property as caretaker by one tenant in common, who was managing the piece of property in question, and other property, for the benefit of himself and his co-tenants. In 1866 a decree was made declaring that this co-tenant was a trustee for himself and the other co-tenants in certain proportions, and he was ordered to convey to the other co-tenants their shares, to be ascertained by the Master. Various proceedings were taken under the decree, and the shares of the different co-tenants were ascertained, the property in question being allotted to the plaintiffs in 1868, but no conveyances were executed. An order vesting the share of the plaintiffs in them was made in 1888.

*Held*, [HAGARTY, C. J. O., dissenting], that the effect of the decree and the ascertainment of the shares was to sever the interests in the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, after such time, contend that he was in possession as their caretaker: and therefore that he had acquired title by possession.

Judgment of ROSE, J., reversed.

Subsequently on appeal to the Supreme Court of Canada the judgment of this Court was reversed and the judgment of ROSE, J. restored.

THIS was an appeal by the defendant from the judgment *Statement.* of ROSE, J., at the trial in favour of the plaintiffs, and came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 10th and 11th of February, 1890.

*J. Reeve*, for the appellant.

*Osler*, Q. C., and *A. MacMurchy*, for the respondents.

The facts are stated in the judgment of the Chief Justice.

May 13th, 1890. HAGARTY, C. J. O. :—

In this somewhat complicated case it may be sufficient to give an outline of the main facts.

For many years the late Francis Heward, as the then eldest son living of his father Stephen, had taken charge of lot 33 in Scarborough; sold wood off it; sold a right

Judgment.

HAGARTY,  
C.J.O.

of way to the Grand Trunk Railway, and exercised various acts of ownership; the other members of the family thinking that he was acting for the joint benefit. At last a suit was brought against him by the others, the result being a decree of the Court of Chancery, 19th of May, 1866, declaring that the lot 33 belonged to the Heward brothers as tenants in common, in the proportions of one-eighth to W. B. Heward; one-eighth to J. O. Heward; one-eighth to Stephen Heward; one-eighth to Augustus Heward, and four-eighths to Francis Heward.

It was declared that the defendant Francis was a trustee for himself and the other parties in said proportions of the legal estate in the said premises. Francis was ordered to convey to the others in the said proportions. It was referred to the Master to divide by metes and bounds, and the parties were to hold in severalty.

Francis was directed to account for rents and profits, and to pay the values to be found by the Master, which were to be liens on his interest in the premises.

Francis appealed to the Court of Error and Appeal. By order of the 22nd of January, 1869, the case was remitted back to Chancery, to enquire whether the defendant Francis had, since his father's death, continuous and unbroken possession for twenty years, and dismissing his appeal if this should be decided against him.

Evidence was accordingly taken, and it was held that he had not such possession, and he was condemned to pay costs there and in appeal.

On the 22nd of February, 1869, an order was made in Chancery making the order in the Court of Error and Appeal a rule of court.

The Master's report, 23rd of September, 1873, allots the several portions set out by metes and bounds as ordered by the decree.

The report merely divided the west part of the lot 33 among the brothers other than Francis.

A previous report by Master Buell in 1868 divided the whole lot, giving to Francis his four-eighths on the east part of the lot.



We may assume from the evidence before us that Master Buell's allotment of the east part to Francis was allowed to stand, and that Master Taylor, on the reference to him, divided the west part among the four brothers. All the orders made in the Court are not before us.

There is no proof before us, and it was not stated on the argument, that Francis ever obeyed the decree by conveying to the brothers their allotments, nor that he ever paid or accounted for the large sums found against him by the Master and ordered to be paid. The unpaid moneys were to remain a lien on his portion of the estate.

The order vesting the ten acres in the present plaintiffs was not issued till the 12th of September, 1888.

We must now glance at the evidence as to possession.

As to actual possession—such as would suffice to give a statutory title to a mere wrong-doer—the evidence is both loose and unsatisfactory.

The defendant was employed in 1853 by Mr. Monro, who had purchased a large quantity of the timber from F. Heward, to look after it and prevent its being plundered, and he was put into a shanty which had been placed there years before. He was engaged in this way for some three years while Monro was taking the lumber. The account of his relations with Heward is very indistinct.

At the hearing of the Chancery suit in 1866 F. Heward swore: "Since 1841 I have always had a servant continuously in possession of this property."

The defendant was called as a witness by F. Heward. He swore that he had then lived thirteen years on the place. "Mr. Monro put me in possession at first. I have remained in the place since by permission of Mr. Francis Heward and cultivate what land I can. Mr. F. Heward is the only one of the family I have had anything to do with."

The defendant says that when he entered there was about half an acre cleared round the house. He began clearing south of the Kingston road.

It was five or six years after he went there that he put up fences north of the road up to the Danforth road and

Judgment

HAGARTY,  
C.J.O.

Judgment.

HAGARTY,  
C.J.O.

fenced, after some time, a couple of years later, all round the block, nearly 100 acres, including the 10 acres in dispute, on which the house was. .

There is no evidence as to his first arrangement with Heward. He denies that he was caretaker. He says Heward used "to be coming out in a buggy after Monro had been down on the place." He apparently asked Heward to let him take some chips and rotten logs, and he gave them to him.

It is clearly proved that on several occasions the defendant interfered to prevent people taking timber or trespassing, professing to be acting for Heward and under his authority.

In 1866 he put off the Kennedys, producing some document he said he had from Heward, and that he had got orders from him to put them off the place.

He brought up before a justice of the peace people named Defoe for trespassing; they denied his authority and the case was adjourned, and the defendant appeared with papers from Heward and the defendants were fined.

He told people it was his place to tell Mr. Heward as to trespassers, that he was caretaker, and that Heward hired him as caretaker. He admits that he tried to stop one Wharf from trespassing, and that he got a letter from Heward forbidding him from trespassing.

This is stated emphatically as occurring also in 1874-5-6, that he was caretaker on the Heward property.

It is almost impossible to form any very clear conclusions as to the state or continuance of the alleged fencing of the large block between the Kingston road and the Danforth road. As to the fence along the Kingston road it seems to have been used for fuel in winter, and repaired in each spring; brush and poles were the usual material of all his fences. There is certainly evidence on his part of some kind of fence being round the block for years.

The ten acres was never fenced as a separate parcel till about 1884, four years before this suit was commenced.

The defendant and his sons cultivated patches here and there through the block fenced in.

The idea on the defendant's part of claiming this land as his own does not seem to have arisen till about 1884.

Judgment.

About 1874, after the lot had been partitioned on the Master's report, the defendant purchased a part of it from the portions allotted to Stephen Heward, and his son Michael purchased also on the same parcel.

HAGARTY,  
C.J.O.

Robert Milburn's evidence is important. He has known the defendant since 1872. In 1876, he bought part of the lot from the defendant, which the latter had bought from S. Heward. In 1880, 1882 and 1884, he bought separate parcels next on the east to these ten acres. These parcels were in the block originally said to have been fenced by the defendant. He bought from the Atcherly estate which claimed through F. Heward. There was no fence then along the Kingston road. The defendant had taken the fences away, and there was nothing to divide these lots from the ten acres. He thinks that from 1872 to 1875, there was a kind of fence round the block. Up to 1877 he thinks the defendant cultivated patches here and there, but thinks he gave it up after that; after that there was no fence; about eleven years before the trial the defendant told witness he was thinking of leaving the place and moving north to the place he had bought, as the land was better, and it was safer, and it was not safe where he was living.

When witness bought these lots, defendant told him he would sooner witness had them than any one else, and said he hoped the witness would not buy the place over his head; that was in 1884. He always told witness that he was in charge for Heward, and he never heard him claim to be anything else, only caretaker there.

Francis Heward had died in 1880. Parties were trespassing on the land, and witness spoke to John Heward, who told him to go and prosecute, as he was a constable. Witness spoke to the defendant and told him what J. Heward had said, that there would be a fuss about it, and "if you don't mind you will be put off;" defendant said he did not believe what witness said, as if Heward had wanted to

Judgment.

HAGARTY,  
C.J.O.

say anything about it, he would have come down and told defendant, or have sent word to him, and would not send witness to look after it.

About a year before witness bought, defendant said to him that he believed he could claim the place; witness told him he did not think he could; that he had gone into court and sworn he was in charge for Heward; that the best thing he could do was to get himself assessed and pay the taxes so many years, as the only way. Witness advised him to fence it, and after that they proceeded to fence it about 1883-4. Witness told defendant's son Jack they should fence if claiming it; witness advised him to get it assessed in his son's name.

This front part of this lot seems to have been assessed as non-resident. From 1883 this ten acres would appear to be assessed to John Donohoe, junior.

The assessor proved that in 1877 defendant was assessed for four acres north of the railway (not this land) and as householder one-tenth of an acre, being the house and garden.

In 1878 the same and John Heward as owners. In 1879 assessed to J. O'Donohoe, junior.

In 1880 the son again four acres and one-tenth acre—J. Heward, owner.

In 1883 the son assessed for four acres north and ten acres south—these ten acres being the land in question, and so on. The assessor says this was done at the son and defendant's request.

That up to 1882 these ten acres had been assessed as non-resident. The defendant before this had asked witness's advice.

He said they were crowding him out and that he was entitled to a certain portion of it. He advised him against having it assessed in his son's name, as it would be against his own title.

Mr. Whitney, acting for Stephen Heward, in 1874-6, made sales to defendant and his son Michael of parts of the lot north of the ten acres on the part allotted to Stephen.



Michael, in June, 1876, then signed a declaration disclaiming all title and admitting Stephen's title.

Judgment.

In 1876 the defendant sold to Milburn the piece bought from Whitney. The two lots next north to the lots bought by Milburn on the Atcherley part had been previously sold to other parties. He says there was no fence on their north line along the Danforth road, only some rotten brush, and nothing to prevent anything from getting on these ten acres either from the Danforth road or the Kingston road.

HAGARTY,  
C.J.O.

Mr. Milburn proved the defendant's admission that he was caretaker for F. Heward. This was in 1874.

J. O. Heward, brother of F. Heward, stated that for the benefit of the plaintiffs (heirs of Augustus), he paid the taxes on these ten acres in 1879, for 1876, 1877, 1878, and in 1882 for 1879, 1880, 1881, and also for 1882, 1883, 1884, and 1885.

In 1886, he understood the defendant had paid them. He stated that F. Heward had taken charge of the property, and the other members of the family understood that he took charge for the family and not for himself.

It was admitted that until the last four or five years the ten acres had never been separately fenced.

The learned Judge found as follows :

"Upon the evidence I did not have at the time of the argument, and I have no doubt now, that the relationship between the defendant and those who put him in possession of the land was that of caretaker of the premises. But it was argued the result of the suit of *Heward v. Heward* was to sever the interests in the property, and that as the defendant in that case had been acting in placing the defendant in this action in possession, and as the result of that suit was that Frank Heward's interest in the property was divested by a partition decree so that thereafter he no longer had any interest in the property in question, the relationship of caretaker must be held to have been put an end to by the result of that decree. The effect of that argument would be, that where a trustee for himself and others puts in possession a caretaker, the

**Judgment.** relationship of caretaker would cease so soon as one of the parties interested in the property should convey away his estate or interest. No authority was cited which supported such a doctrine, and I think it is not one to which I should give effect. The relationship having been shewn to exist it is clear it was incumbent upon the defendant to show that that relationship ceased, and the evidence to establish that point should be clear and convincing, because the Court will not assume that he who was put in possession as caretaker became tenant at will except by some act clear and unequivocal, which would convey notice to the party for whom he was taking care of the property."

HAGARTY,  
C.J.O.

It is to be regretted that there was no evidence of any original bargain as to caretaking between the defendant and Heward. The latter's death in September, 1880, closed one important source of information, and the defendant denies it, although admitting many facts indicating its existence, and faintly denying others.

It appears to me not necessary to prove any such express bargain.

*Lyell v. Kennedy*, 14 App. Cas. 437, decided last year in the House of Lords, is a most instructive case. It was an action to recover possession of land and an account of rents and profits. The defendant had been in the habit of receiving rents of an estate for a lady who died intestate. For many years he continued such receipt—the tenants knowing nothing of her death; and the true heir not appearing. He had both declared and written letters that he was ready to account to the true heir when found. After twelve years he set up the Statute of Limitations to an action by the heir. The general law is reviewed.

Lord Macnaghten says, at p. 463: "I do not think it can make any difference what the nature of the property may be, whether it is a lump sum, or collected in the shape of rents accruing from time to time. I do not think it can make any difference whether the person on whose behalf the property is professedly received is or is not under disability, or unborn or unascertained. Nor do I think it can

make any difference whether the duty arises from contract or is connected with some previous request, or whether it is self imposed and undertaken without any authority whatever. If it be established that the duty has in fact been undertaken and that property has been received by a person assuming to act in a fiduciary character, the same consequences must, I think, in every case follow."

Judgment,  
HAGARTY,  
C.J.O.

Lord Selborne very fully reviews the general law and authorities. He says (p. 459): "No authority was cited for the respondent to shew that he was not chargeable in a fiduciary character under these circumstances, or that as long as he acted as agent and receiver for the heirs (though unascertained) any Statute of Limitations would run against them in his favour. In the absence of authority, I should have been content to decide such a case on principle."

He then cites some cases; none of them resemble this case, as to the position of a caretaker. We must I presume if such a relation be established consider it as, at least to some extent, of a fiduciary character. The ordinary result is that the caretaker's possession is that of the person for whom he acts or professes to act.

*Ryan v. Ryan*, 5 S. C. R. 387, may be referred to as to the position of a caretaker setting up the statute. It is very full, especially the judgment of Mr. Justice Gwynne, and the distinction is clearly emphasized between verbal declarations or admissions given in evidence to prove the relationship, and those sought to prevent the operation of the statute generally, as in *Doe Perry v. Henderson*, 3 U. C. R. 486. This case seems inconsistent with the views expressed by Moss, C. J., in this court, as to what was necessary to constitute a caretaker.

The case of *Truesdell v. Cook*, 18 Gr. 532, does not turn on the evidence as to what took place between the parties.

I am of opinion that to a suit brought by Francis Heward, or any one claiming through or under him, the defendant could not, on this evidence, successfully urge the Statute of Limitations.

Judgment.

HAGARTY,  
C.J.O.

I think we must follow the law laid down in *Ryan v. Ryan*, 5 S. C. R. 387. There it was expressly found at the trial that the plaintiff was in possession as caretaker. Here the same finding is before us.

It was pressed on the learned Judge at the trial, and upon us in the argument, that these plaintiffs could not escape the operation of the statute, although Francis could; that their interest was not derived from him, etc.

The title of the Heward family starts for the purposes of this case from the decree of 1866.

Francis was declared a trustee of the legal estate of the whole for himself and his brothers.

Up to his death in 1880, eight years before action was brought, the defendant could not have resisted his right to possession.

His interest as trustee under the decree seems never to have been legally vested in these plaintiffs until the vesting order of 1888 just before action. This order vests the parcel in question in the plaintiffs for all the estate therein of both plaintiffs and defendants in the action of *Heward v. Heward*.

I do not see why the plaintiff should not have the benefit of any arrangement as to taking care of the premises made by F. Heward while he occupied the position in which he is declared to be by the decree of 1866.

If he had obeyed the order of the court and conveyed as directed by the decree to the plaintiffs, their title would rest upon the decree and the conveyance. In an ordinary sale from A. to B. the purchaser would have all the rights of A. as to the premises conveyed, and could prove the nature and extent of any possession set up against him, as his vendor could.

The learned trial Judge decided the case wholly on the caretaker question, and expressed no opinion on the sufficiency of the defendant's alleged possession irrespective of the other point. We have not therefore the benefit of his views on the somewhat confused evidence.

As a juror I should find on the evidence that, except as



to the house or shanty and half acre or acre surrounding it, the defendant has proved no such exclusive possession under the statute of the ten acres as to oust the true owner's right. It is admitted that till 1884, or four years before this action, the ten acres were never separately held. The attempt to prove such possession by the contradictory evidence as to the whole block being enclosed does not, in my judgment, prove the defence.

It is clear that until within the statutable period the defendant appears to have had no idea of asserting any claim, and for several years before his so doing the ten acres lay open to all the world, and the land around had been sold to various parties, including the defendant and his family.

The dealings with the assessment of the land are very suggestive of the true state of the case.

If the case rested solely on the ordinary defence of a statutable possession I would find against the defendant, except as to the shanty and garden enclosure, to which I think he proves his case. But, on the whole, I think the judgment appealed from should stand.

BURTON, J. A. :—

There was a great mass of evidence given in this case not very easy to comprehend without reference to the plans, but when sifted and understood, and we have satisfied ourselves upon the admitted facts upon whom was the onus of proof, the case resolves itself into a question of law—or rather two questions of law : 1st, Whether there was any evidence to displace the *primâ facie* case of title by possession ; and, 2nd, Assuming that the defendant originally entered as caretaker, did that character cease on the partition ordered by the decree being perfected.

Upon the first of these questions it is not disputed that the defendant was put in possession originally of the whole farm ; his possession was a rightful possession and extended without fence or other enclosure to the whole.

Judgment.

HAGARTY,  
C.J.O.

Judgment.

BURTON,  
J.A.

But he did fence in the whole block of which the ten acres formed a portion, and from time to time after the partition as portions were sold, the block was encroached upon.

Now his possession having been originally lawful, the onus was upon those who are now claiming to turn him out of possession, to show an entry upon the ten acres within the statutory period, or a clear abandonment; it is not the case of a trespasser entering upon a lot where his possession will not extend beyond the portion actually enclosed and cultivated, but here the possession extended originally to the whole, and where the evidence fails to establish such entry or abandonment, the defendant cannot be disturbed. The evidence as to the state of the fence round this particular ten acres during a portion of the statutory period becomes, under these circumstances, comparatively of little importance, in face of the evidence, which is uncontradicted, that the defendant never did abandon, or intend to abandon possession, and so his title is established unless the fact that he originally entered as caretaker displaces it.

His possession originally was that of Francis Heward, and as we see in the old proceedings very nearly ripened into a title in favour of Francis, and against his co-tenants. By the decree in the former suit the parties were declared to be entitled as tenants in common in certain proportions, but owing probably to the fact that the executors of the testator had never proved the will or taken upon themselves the execution of the trusts it contains a declaration that Francis Heward was a trustee of the legal estate, and he was directed to convey to his co-tenants.

However that may be, upon the confirmation of the Master's report each of the co-tenants became entitled in severalty to the portion allotted, and to take the necessary steps to obtain possession of their shares, and it follows that the possession of the defendant from that time commenced to run in favour of himself and not as before in favour of Francis Heward whose bailiff or caretaker he had been.

It would have been no answer to any such action by these plaintiffs for O'Donohoe to say that he was in there by the permission and authority of Francis, whose interest in the property had ceased.

Judgment.

BURTON,  
J.A.

I do not elaborate this point as it is fully dealt with by my brother MACLENNAN.

Something has been said about the legal estate being outstanding in Francis. I should not have thought it material if it had been so but it was not; the legal estate was in Col. Atcherley to whom Francis had mortgaged it, and Col. Atcherley shortly after the date of the Master's report gave the usual statutory certificate of discharge of that mortgage so far as it affected the premises other than those allotted to Francis, so that the other co-tenants thereby became legally as well as equitably seized of the shares allotted to them in severalty.

I think it therefore clear, and I may add that I regret to be compelled to come to that conclusion, that on both grounds the plaintiffs fail, and that judgment must be entered in favour of the defendant.

MACLENNAN, J. A. :—

After a most careful and anxious consideration of this case, I have been led to the conclusion that our judgment ought to be for the appellant.

The first question is, whether the defendant has had possession of the ten acres for a sufficient time to bar the claim of the plaintiffs; and the other is, whether if the first question is found in the defendant's favour, his possession was not his own possession, but in reality the possession of the plaintiffs held by him as their bailiff or caretaker.

We have not the advantage of the opinion of the learned trial Judge on the first question, his judgment in favour of the plaintiffs having proceeded on the conclusion to which he comes in their favour on the second question.

I have examined the evidence to the best of my ability,

Judgment. and on the question of possession, I think the proper  
MACLENNAN, inference is, that the defendant has occupied the ten acres  
J.A. uninterruptedly, at least from the first day of September, 1868, to the present time. There is no dispute that this is the proper conclusion with reference to the cottage and an undefined piece of adjacent ground of half an acre or thereabouts, for the defendant has lived in the cottage ever since about the year 1854. But it is said that he has not had anything that can be called possession of anything more, for a sufficient length of time. It is the case of both parties that at the time of the Chancery suit in 1866, he was in possession of the whole lot; but the plaintiffs say he was there as bailiff of Francis Heward, which the defendant denies, and says he was tenant at will.

I think the evidence of Robert and Ellen Milburn ought to outweigh that of the defendant on this point, and that the defendant is to be regarded as having been, as he told the Milburns, in as caretaker of Francis. Francis' title to the ten acres remained unchanged until the partition made by the Master's report on the 30th of June, 1868, in pursuance of the decree of the 5th of October, 1866, and up to that time, at all events, the possession of the defendant certainly did cover the whole ten acres.

Then the evidence of the defendant's son Michael, of Henry Windsor, and of the defendant himself, is clear that about six or seven years after he went there, that is, in about 1860 or 1861, he enclosed with a fence the whole block lying between the Kingston road and the new Don and Danforth road, of which the ten acres in question is part; and that from that time he cultivated such parts of the enclosed land as he found suitable. The fencing, no doubt, was rude, and so was the husbandry, but in my judgment the fence was intended to define and protect his use and occupation of the land; and I think it had that effect, and that it constituted a legal occupation of it.

This evidence of the defendant's witnesses is corroborated in the most distinct manner by Milburn, called for the plaintiffs. He says he went to that neighbourhood on the



13th of April, 1872, and that at that time the defendant had the whole block enclosed just as the defendant's witnesses described it. He says he used to help the old man to repair the fence round the block, and that he did so a dozen different times; the last time being in 1877 or 1878. From this point, the evidence of the defendant and Milburn differs. Milburn and others about this time bought different parcels of the east half of the enclosure; and Milburn's evidence tends to shew that the defendant from that time ceased to keep up the fences, and neglected and abandoned his possession of the enclosure. No doubt he did give up his possession of the parcels sold, that is, of the east half, and of course the east fence of the block was no longer of any interest or consequence to him, but the defendant denies that he abandoned any more than the parcels sold; and asserts that he kept up the other fences all the time; and that the fence on the east side, which Milburn admittedly put up almost immediately, served him in place of the old one. He asserts in effect that he still maintained possession of the ten acres and kept it enclosed by fences.

Milburn is very positive that when he bought his first piece of land on the 30th of June, 1880, on the east side of the block, there was no fence either in front or on the east side of the three parcels, and that the fence along the Don and Danforth road had been allowed to fall into decay. I think the proper conclusion from the whole evidence is, that about 1878 or 1879, when sales began to be made of the eastern part of the enclosure under the Atcherley mortgage, the defendant did, as he admits he did, abandon the Atcherley part, and did not erect any fence along the eastern limit of what he retained, but left it to the purchasers to put up the fences, which they very soon did.

Now, I think the result of the authorities is that the defendant did not for the purpose of the running of the Statute of Limitations cease to be in possession of the

Judgment.

MACLENNAN,  
J.A.

Judgment. remainder of the block which he had not expressly abandoned, merely because he neglected cultivation and allowed the fences to fall into disrepair, for an interval of two or three years, seeing that he still continued to reside on the land as he had done for years before. It is not the case of a mere trespasser or squatter, whose original taking of possession was wrongful and without colour of right, and whose possession cannot be regarded as more extensive from time to time than his actual beneficial cultivation or enclosure: See *Harris v. Mudie*, 7 A. R. 420. I think the law applicable to the defendant's case is the same as would be applicable to the case of a tenant from year to year or a tenant at will of a farm consisting partly of unenclosed woodland. I cannot doubt that in such a case the statute would run under section 5, (6) (7) of the Limitation Act in favour of the tenant in respect of the unenclosed woodland as well as in respect of the dwelling-house and cultivated fields in the absence of clear evidence of abandonment.

MACLENNAN,  
J.A.

So I think that in the face of this defendant's declaration that he never abandoned possession of the ten acres, the want of fences is not sufficient to warrant a finding to the contrary, and that the proper conclusion is that his possession of the ten acres was never interrupted between the year 1868 and the commencement of the present action.

The other question is as to the character of the defendant's possession.

As I have already said, it was, for some years prior to 1868, as the bailiff or caretaker of Francis Heward.

In law that was the possession of Francis Heward himself. If Francis Heward had himself taken possession, being a tenant in common, his occupation would have been in no sense that of his co-tenants; he would not have been accountable to them in any way, and in the absence of ouster they could have brought no action against him, and if allowed to occupy for the statutory period the rights of

the co-tenants would have been barred. While, therefore, the defendant was Francis' bailiff or caretaker, he was not the bailiff of the other parties. He owed them no duty; he was not accountable to them. They could bring no action against him. I think that was clearly his position until 1868. Then what was the effect of the partition proceedings? On the 30th of June, 1868, the late Master Buell, by his report of that date, partitioned the land between Francis on the one hand and the other tenants in common on the other, so that from that time Francis ceased to have any interest in the ten acres in question. The whole of the east half of the lot from the lake to the first concession, and also a strip of the west half, 216 feet wide, lying adjacent to the ten acres, were allotted to Francis; and the remainder of the land, including the ten acres, was allotted without division to the other tenants in common, including the present plaintiffs, for their father, Augustus, had died in 1866, intestate.

Judgment.  
MAULENNAN,  
J.A.

The report was filed on the 5th of July, and allowing for vacation, became absolute on or about the 6th of September. On that day, therefore, by the joint effect of the decree and the report Francis ceased to have any interest in the ten acres, and the other tenants in common became sole owners of it. Of course the decree operated only in equity, but it appears from Mr. Buell's report that the title of all the parties was an equitable title. The legal estate had been in Francis, but he had mortgaged it in 1863 to Col. Atchlerley to secure \$4,000, and that mortgage was still outstanding; therefore the decree and report put an end to all right and interest of Francis, and by consequence to all right and interest of the defendant in the ten acres, but left the latter in possession. There was no privity between the defendant and the other tenants before, and I am unable to see that any privity now arose. He and they were now at arm's length, and they could now turn him out of possession. Until then he could have defended his possession through his master, Francis, but Francis' title

Judgment. having now ceased, he could have no defence any  
MACLENNAN, longer.

J.A.

It is true that the decree declares Francis to be "a trustee for himself and the said other parties in the proportions aforesaid of the legal estate in the said premises." But the language is inaccurate; a man cannot be trustee for himself. If Francis had had the whole legal estate he would have been trustee for the others of one undivided half, and as to the other undivided half he would be seized in fee to his own use. But the real fact was as I have said, and as was found by the Master's report, that Francis had conveyed the legal estate in 1863 to Atcherley, and so was not now a trustee for the other parties in any sense or for any purpose.

It was, however, contended that the defendant was in as caretaker for the others after the partition, that is that he had so acknowledged. But I think the evidence does not make that out. He says himself that Francis was the only one of the family he knew, and the Milburns say that is what he told them, and Ellen Milburn says: "He said he was caretaker for Francis Heward," and "I never heard him say he knew any other of the family but Francis Heward," and I do not find anything inconsistent with this in any of the other testimony. There was, therefore, from the 5th of September, 1868, no ground of trust or privity of any kind between the other tenants in common and the defendant to prevent the statute running in his favour and against the plaintiffs, and I think, with great respect to my learned brother ROSE, that the statute did then begin to run and continued without interruption until the commencement of this action.

This action was commenced on the 10th of October, 1888, more than twenty years from the 5th of September, 1868, and I think it was brought too late as to all the parties, including the plaintiff Stephen, who was born in 1864, and has ever since been a person of unsound mind, and who could not therefore be barred in less than twenty years.



I think, therefore, the judgment should be reversed and entered for the defendant.

Judgment.

MACLENNAN,  
J.A.

OSLER, J. A., concurred with BURTON, and MACLENNAN, JJ. A.

*Appeal allowed with costs, HAGARTY, C. J. O., dissenting.*

An appeal by the plaintiffs from this Court to the Supreme Court of Canada was allowed, and the judgment of ROSE, J., at the trial was restored.

UNITED COUNTIES OF LEEDS AND GRENVILLE V. TOWN OF  
BROCKVILLE.

*Canada Temperance Act—Section 2—Application of fines—49 Vic. ch. 48,  
sec. 2 (D.)—Money paid and received.*

The Canada Temperance Act came into force in the united counties of Leeds and Grenville on the 1st May, 1886.

Section 2 of the Act declares that the word "County" includes every town, township, etc., within the territorial limits of the county, and also a union of counties.

The town of Brockville was then an incorporated town separate from the counties for municipal purposes.

An order-in-council passed pursuant to 49 Vic. ch. 48 (D.) provided that all fines recovered under "The Canada Temperance Act, 1878" within any *city or county* which had adopted the Act, should be paid to the treasurer of the city or county as the case might be. Subsequently another order-in-council was passed cancelling the former, and providing for payment of such fines to the treasurer of the *city or incorporated town, separated for municipal purposes* from the county, or county within which they were recovered :—

*Held* [MACLENNAN, J.A., dissenting], that fines imposed and recovered for offences against the Act committed within the town of Brockville, paid over by the police magistrate of Brockville to the treasurer of the united counties of Leeds and Grenville between the dates of the two orders-in-council, could not, after the passing of the second order-in-council, be recovered back by Brockville.

Judgment of the Queen's Bench Division, 17 O. R. 261, reversed.

Statement.

THIS was an appeal by the plaintiffs from the judgment of the Queen's Bench Division, reported 17 O. R. 261, where, and in the present judgments, the facts are fully stated. The appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A.] on the 13th of May, 1891.

*W. R. Meredith*, Q. C., and *J. H. Macdonald*, Q. C., for the appellants.

*C. F. Fraser*, Q. C., and *Aylesworth*, Q. C., for the respondents.

June 30th, 1891. HAGARTY, C. J. O. :—

I would willingly join in affirming the judgment of the Queen's Bench in favour of the defendants if I could bring myself to understand on what principle of law we can hold that Brockville can maintain an action for this money.

If these moneys for fines, etc., had been regularly transmitted to the Government and they had thought proper to give them to the united counties under their own order-in-council perhaps they might have had some right to recover them back if they could shew they had been so paid under a mistake of fact. It may be, however, that having been so paid the Government had finally elected under the statute so to apply them to a municipality, which wholly or in part bore the expense of administering the law under which the fines were imposed.

But the Crown never actually received the money and by its first order directs that the fines received or enforced under the Canada Temperance Act within any city or county which has adopted the Act be paid to the treasurer of the city or county. The police magistrate or other officer having custody of these moneys would literally and fully obey this order by handing the amount over to the treasurer of the united counties which had adopted this Temperance Act.

All this was regularly done while the order was in force.

I cannot understand how the second order cancelling the first and making a different provision as to these fines can affect or make illegal acts done while the first was in force. I am of opinion that Brockville cannot recover this money from the counties.

I fully adopt the line of reasoning in the very clear judgment of my learned brother Street, who dissented in the court below, and I refer thereto to save repetition here.

Unless we are prepared to hold that this money is in the hands of the plaintiffs as money paid and received for or to the use of Brockville I cannot see how the claim can be sustained.

I think it was finally disposed of by the first order and the payments made in pursuance of it.

Judgment.

HAGARTY,  
C.J.O.

Judgment. BURTON, J. A. :—

BURTON,  
J.A.

If compelled to decide against the respondents, I shall do so with great regret—the merits are wholly with them, and it is a matter of surprise with me that the counties should resist a claim so equitable and just in itself.

It is, however, a pure question of law upon the construction of the orders-in-council and the statute under which they were passed.

Some confusion has, I think, arisen in not constantly bearing in mind the difference between the language of the Temperance Act, and that of the statute under which the orders-in-council were passed.

By the Interpretation Clause of the Canada Temperance Act, the expression “county” includes every town, township, parish, and other division or municipality, except a city, within the territorial limits of the county or united counties; in other words it disregarded the division of the province into municipal districts, and adopted an arbitrary territorial division for the purposes of the Act, which ignored the general division made for municipal purposes. Such a territorial division did not possess any corporate capacity or any legal entity; it was a mere territorial division for the purpose of the Act, without a treasurer or official of any kind except those appointed under the Act.

The Act 49 Vic. ch. 48, contained no such interpretation clause, but it directed that the governor in council might from time to time direct that any fine, penalty, or forfeiture, or any portion thereof, which would otherwise belong to the Crown, for the public uses of Canada, be paid to any provincial, municipal, or local authority which wholly or in part bears the expenses of administering the law under which such fine, etc., was imposed, or that the same be applied in any other manner deemed best adapted to attain the objects of such law.

Under its provisions, the governor in council on the 29th of September, 1886, passed an order-in-council to this effect:

“His Excellency in Council, on the recommendation of



the Minister of Justice, and pursuant to the provisions above recited, has been pleased to order, and it is hereby ordered, that all fines, penalties, or forfeitures, recovered or enforced under the 'Canada Temperance Act, 1878,' and amendments thereto, within any city or county *which has adopted the said Act*, which would otherwise belong to the Crown for the public uses of Canada, be paid to the treasurer of the *city or county*, as the case may be, for the purposes of the Act."

Judgment.

BURTON,  
J.A.

It is contended that this order-in-council applied only to a county or united counties proper within the meaning of the municipal Acts, and not to a county or territorial division constituted under the Temperance Act into a county, which might contain a number of towns or other minor municipalities separate from the county itself for municipal purposes; and this, upon reflection, I think, must be the proper construction to place upon it.

If the other construction were adopted, there is no person filling the position of treasurer to whom the money could be paid. The treasurer of the county would not do, for he is only the treasurer of a portion of the so-called county and *a fortiori*, the treasurer of the town could not be so regarded.

If the order-in-council is confined to a county within the meaning of the law dividing the province into counties for municipal purposes, whilst the order might be authorized, as the county undoubtedly bore, or was liable to bear, a portion of the expenses of administering the law, can it be assumed that it was intended to apply to any fines, etc., other than those imposed within its territorial limits?

In the first order-in-council, the fact that the word "county" in the Temperance Act, included more than is meant under the general law, was probably over-looked, and so soon as the error was discovered, a second order-in-council was passed, on the 15th of November, 1886, containing a similar recital to that contained in the former one, and proceeding in these terms:

Judgment.

BURTON,  
J.A.

“His Excellency in Council, on the recommendation of the Minister of Justice, and pursuant to the provisions above recited, has been pleased to order, and it is hereby ordered, that the order-in-council of the 29th day of September, A.D. 1886, relating to the application of fines and penalties imposed under the said Act, be and the same is hereby cancelled, and that all fines, penalties or forfeitures recovered or enforced under the ‘Canada Temperance Act, 1878,’ and the amendments thereto, within any city or county, or any incorporated town separated for municipal purposes from the county, *which would otherwise belong to the Crown for the public uses of Canada*, be paid to the treasurer of the city, incorporated town or county, as the case may be, for the purposes of the said Act.”

Whichever view is adopted it seems to me that the order-in-council first made did not refer to the fines imposed in another municipality, and that the moneys paid over by the treasurer of Brockville still remained the property of the Crown until they were dealt with by the second order.

The word county must receive the same interpretation in both orders.

It is quite possible that if the whole of these moneys—county and town—had been paid into the hands of the Government and they had paid over the whole to the treasurer of the united counties, that payment would have been irrevocable. They came within the words of the Act of Parliament and the Government would have exercised its discretion and there would have been an end of the matter, but that is not this case. Here is a general order-in-council applying to city and county municipalities as defined by the general law; an omission is made of a minor separate municipality in which fines and penalties were imposed, and with reference to such minor municipality, as I read the first order-in-council, no disposition was made of the fines levied within its limits, and those fines were still subject to the control of the Crown, and I think were disposed of by the second order-in-council.

Judgment.

BURTON,  
J. A.

I have nevertheless felt considerable difficulty in seeing my way clearly to hold that Brockville is entitled to recover. If the money had remained in the hands of the county in specie, then I think, as it would still have been the property of the Crown, it would have passed to Brockville under the second order-in-council; but as I understand the facts, although the amount so paid to the county remained unexpended, still it did not exist in specie, but would at most be but a debt to the Crown as money paid to them by an agent of the Crown by mistake; yet if the Crown could recover and then pay it over there should be no technical difficulty, if the Crown is willing to join in the proceedings, in a remedy being applied; and if it is clear that the Crown could recover, it is to be hoped that the county would not resist payment on a ground wholly beside the merits.

I think if the Crown assents such an amendment as may be necessary should be made.

OSLER, J. A. :—

I think the defendants are not entitled to recover upon their set-off. They shew no legal or equitable debt or other cause of action against the plaintiffs.

What the Act, 49 Vic. ch. 48, provides is, that the Governor in Council may from time to time direct that any fine, penalty, or forfeiture which would otherwise belong to the Crown, be paid to any provincial, municipal, or local authority which wholly or in part bears the expenses of administering the law under which such fine is imposed; or, that the same be applied in any other manner deemed best adapted to attain the objects of such law, and to secure its due administration. What is contemplated by this section is, that the fine shall either be paid to a municipal authority, or that it shall be applied in some other manner than by being so paid; the intention in both cases being to attain the object of the law under which the fine is enforced, and to secure its due administration.

Judgment.

OSLER,  
J. A.

Under the authority of this section, an order-in-council was passed on the 29th of September, 1886, whereby it was ordered that all fines, penalties, or forfeitures recovered or enforced under the "Canada Temperance Act, 1878," and amendments thereto, within any city or county which has adopted the said Act, should be paid to the treasurer of the city or county, as the case may be, for the purposes of the Act.

The treasurer is referred to merely as the official who is to receive the money for the municipality, not as a *persona designata* by whom it is to be received and administered.

This order was of general application wherever the Canada Temperance Act was in force.

In assumed compliance therewith, the police magistrate of Brockville, on the 13th and 16th of October, 1886, paid over to the treasurer of the united counties of Leeds and Grenville, two sums of money, amounting in all to \$1,725.85, of which \$750 had been received by him for fines imposed for offences against the Act committed in the town of Brockville.

Assuming that the moneys so received by the police magistrate instead of being in the first instance paid by him into the public chest, and thence disbursed by the executive under the authority of the order-in-council, might properly have been paid direct to the municipality, then I think that the order-in-council warranted the payment to the treasurer of the united counties of Leeds and Grenville, which was territorially a county which had adopted the Act, of all fines recovered or enforced within their limits, whether in Brockville or not.

Saving the case of a city, a county is the only municipality to which the Act can be applied. It affects the territory of the county or united counties, including all smaller municipalities within that limit; and in speaking of the territory affected, it can only be described as "a county which has adopted the Act." A town separate from the county, is included, because it is within the territorial limits of the county, and the Act says it shall be included.



But when you speak in the same connection of the treasurer of the county, it seems to me that the idea conveyed by that collocation of words, is of county in its municipal sense, just as if the order-in-council had expressly said "the fines recovered in the county of Leeds and Grenville, which has adopted the Act, shall be paid to the treasurer of the county of Leeds and Grenville." That union of counties has adopted the Act. All municipalities within its limits are subject to the Act, but when it is said that fines shall be payable to the treasurer of the county, it is apparent that what is meant is the public official who is the treasurer of the municipal organization, so that fines received within the territory subject to the Act, are payable to the municipal county which in part bears the expense of administering the law under which the fine is imposed. It cannot mean "treasurer of the town," for the town has not adopted the Act, nor could it do so, and the words "treasurer of the county," will not admit of that interpretation.

Judgment.

OSLER,  
J.A.

It was strongly urged upon us that the word "county," must have the same meaning wherever used in the order-in-council. But the elementary rule of construction invoked in that argument is not of universal application. To apply it in this instance would render the order nugatory, there being no treasurer of the territory to which the Act has been applied, while there is such an officer of the municipal organization. If then the Act admits of an order being made for payment of all the fines recovered or enforced within the limits of the county, as defined by the Act, to the treasurer of the municipal county, the latter being a municipality which in part bears the expense of administering the law under which the fines are imposed, this order-in-council was valid, and the payment to the plaintiffs through their treasurer, an effectual payment. I think the payment thus made was not revocable, at all events that it was not revoked by the order of the 15th of November, which was a general order applicable to all counties where the Act was in force, but which cannot, by

Judgment.

OSLER,  
J.A.

any reasonable construction, as it seems to me, apply to a past and closed state of things. The united counties of Leeds and Grenville fulfilled the condition of being a municipal authority which in part bore the expense of administering the law; whether they had, when either of the orders-in-council was made, actually expended anything on that account, is, I think, not important. They were bearing the expense, being under a liability and obligation to expend moneys for the purposes of the Act, and when they received the fines in question from the police magistrate, the payment over to them was complete; the ownership of the money was changed, and whether or not the Crown could, by a direct proceeding for the purpose of recalling it, have undone the transaction, or compelled an account or repayment, I cannot agree that by merely passing the order of the 15th of November any such intention is manifested, much less that any legal right, enforceable by action in their own name, is thereby conferred upon the defendants, to moneys already paid over to the plaintiffs—moneys which have ceased to be earmarked or distinguishable in any way from other moneys of the plaintiffs—and which, if under any circumstances recoverable by the Crown, would be so merely as an ordinary debt, as an assignment of which it is impossible that the second order-in-council can operate.

In this view, it is not very material to consider whether the orders were made under the first or second branch of the fifth section of 49 Vic. ch. 48.

In neither case is the money paid over in this particular case pointed at by the second order. Conceding that the municipality received it as agents or administrators for the Crown, a moment's reflection must shew that something more than an order in the general terms of the order of the 15th of November is necessary to indicate the intention of the Crown to determine the agency in respect of money thus received, which the plaintiffs were not bound to retain in specie or place to a separate account. But the result would be the same even if the money had

been paid over improperly—if it should not have been paid to the plaintiffs under the first order at all. It became a debt to the Crown, who may sue for and recover it, but it has not in any way that I can conceive become the property of or recoverable by the defendants. I incline I must say to the opinion of Street, J., that the order practically operated as a gift to the municipality. I think it was made under the first branch of the section, and that the Crown retained no further interest in or control over the money. The order no doubt expressed that the money is paid over for the purposes of the Act, but that merely indicates the motive of the Crown in making the order; it is not directed to be applied “in any other manner,” that is to say, there is no indication that it is to be applied otherwise than in recouping the municipality, which in fact bears the expense of administering the law, or placing funds in their hands to meet any call which may be made upon them for that purpose. In short in an order under the second branch of the section we should expect to find some mode of administering the fund defined.

For these reasons I am of opinion that the appeal should be allowed.

MACLENNAN, J. A. :—

I am of opinion that our judgment on this appeal should be for the respondents.

The question turns as it appears to me upon the construction to be put upon the order-in-council of the 29th of September, 1886.

The second section of the Canada Temperance Act declares that in that Act the word “county” includes every town, township, parish, and other division or municipality (except a city) within the territorial limits of the county, and also a union of counties, where united for municipal purposes.

Accordingly throughout the Act the word “county” is used as sufficient for the purposes of the Act to describe a

Judgment.

OSLER,  
J. A.

Judgment.  
MACLENNAN  
J.A.

county or union of counties for municipal purposes, plus a town separated from a county or union of counties for municipal purposes. The word is used in the Act in a special sense. The Temperance Act was brought into force in the united counties of Leeds and Grenville, and the effect of using the words in the sense of the Act of Parliament was that the municipal territory of Leeds and Grenville, plus the town of Brockville, was a "county" within its meaning.

In that state of things the order-in-council of the 29th of September was passed, and it orders that the penalties received or enforced under the Canada Temperance Act within any city or county which has adopted the said Act which would otherwise belong to the Crown be paid to the treasurer of the city or county as the case may be for the purposes of the Act.

I think it is plain that the Governor-in-Council has used the words "city or county" in the same sense as the Act of Parliament, which was there before him, and that the words "*county which has adopted the said Act*" describes accurately the counties of Leeds and Grenville and the town of Brockville taken together.

Then is there any difficulty with the other words "be paid to the treasurer of the city or county?" In my humble judgment there is none. There were really two treasurers in the county in the present case, the county's treasurer and the town treasurer, each of them being an officer of a "local authority which wholly or in part" was bearing within the county the expenses of administering the Temperance law. The sole defect in the order-in-council as applied to a case like the present is in not determining the proportions in which the penalties are to be divided. I do not see why that difficulty should be serious in any case, but I understand it is agreed in the present case that if the defendants are entitled at all, the sum which they claim is their just proportion.



The appellants subsequently moved for judgment, showing that the Crown declined to interfere, and BURTON, J. A., then joined in allowing the appeal.

Judgment.  
BURTON,  
J.A.

*Appeal allowed with costs, MACLENNAN, J. A., dissenting.*

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MARTIN V. MCMULLEN ET AL.

*Principal and surety—Guarantee—Floating balance—Ultimate balance—Bankruptcy and insolvency—Dividends.*

The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold; provided I shall not be called on in any event to pay a greater amount than \$2,500."

M. made an assignment for the benefit of his creditors, being then indebted to the guaranteed creditors in the sum of \$5,556.23. They filed their claim therefor with the assignee and afterwards received from the plaintiff the full amount covered by the testator's guarantee.

The plaintiff contended that he was entitled to rank upon the estate for so much of the debt as had been thus paid by him.

*Held*, [OSLER, J. A., dissenting] that the guarantee was one of the whole debt incurred, or to be incurred, with a limitation of the liability to \$2,500, and, therefore, that the plaintiff was not subrogated to the rights of the secured creditors or entitled to receive the dividends in respect of that part of their debt which he had paid under the guarantee.

*Per* OSLER, J. A., the guarantee was a continuing guarantee, limited in amount, to secure a floating balance, and so a guarantee of part of the debt only, the dividends on which, the surety having paid it, he was entitled to receive. *Ellis v. Emmanuel*, 1 Ex. D. 157, considered.

Judgment of the Queen's Bench Division, 20 O. R. 257 reversed, and that of STREET, J., at the trial, 19 O. R. 230, restored.

THIS was an appeal by the defendants from the judgment of the Queen's Bench Division, reported 20 O. R. 257. Statement.

The plaintiff was the executor of one Jonathan Martin and the defendant McMullen was the assignee for the benefit of creditors of the firm of McGachie Bros. This firm were customers of the defendants Ogilvy, Alexander & Anderson, and on the 8th of March, 1888, Martin gave to Ogilvy, Alexander & Anderson, the following guarantee:

## Statement.

"Dear Sirs :—In consideration of the goods sold by you on credit to McGachie Bros., of Woodstock, and of any further goods which you may sell to McGachie Bros. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold, provided I shall not be called on in any event to pay a greater amount than twenty-five hundred dollars. You shall have the right to accept and release collateral securities, to release securities, to extend the time for payment, to take notes or bills in settlement for goods sold or to be sold, and renew same, compromise or compound the said indebtedness or any part thereof, either during the said period or afterwards without notice to me."

At the time of McGachie Bros.' assignment, they owed \$5,556.23 to Ogilvy, Alexander & Anderson, who duly filed their claim for that amount. Ogilvie & Co. also called upon the plaintiff to make payment under the guarantee, and received from him \$2,500. The plaintiff then filed a claim against the estate for the \$2,500, paid by him; but this claim was disputed and this action was thereupon brought to establish the right to rank.

The action was tried before STREET, J., at Woodstock, on the 14th of March, 1890, who subsequently dismissed it with costs, holding that the guarantee was one to secure an ultimate balance. This judgment was reversed by the majority of the Queen's Bench Divisional Court, and this appeal by the defendants from the judgment of the Divisional Court, came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.] on the 3rd of June, 1891.

*Geo. C. Gibbons*, Q. C., for the appellants.

*W. Nesbitt*, and *A. W. Aytoun-Finlay*, for the respondent.

September 15th, 1891, HAGARTY, C. J. O. :—

Judgment.

HAGARTY,  
C.J.O.

The case rests upon the law as laid down by Lord Hatherley, in *Hobson v. Bass*, L. R. 6 Ch. 792, and by Lord Blackburn, delivering the judgment of himself, Lord Cairns and the present Master of the Rolls, in *Ellis v. Emmanuel*, 1 Ex. D. 157.

The distinction is pointed out between the two classes of guarantees, one where the contract is to be construed as a security for a part only of the debt, and the other where it is to be construed as a security for the whole amount due or to become due with a provision limiting the surety's liability to pay any amount beyond a named sum.

I am compelled on the authorities to hold that the guaranty before us belongs to the latter class. The distinction between the two classes is admitted to be both artificial and technical, but as we are bound to hold that it is distinctly recognized as existing and to govern, we cannot refuse to act upon it. The words used seem to me to clearly shew a suretyship for the whole debt due or to become due of the principal debtors, and an indemnity against loss thereon, limiting the ultimate liability of the guarantor to the named sum.

I regret having to arrive at this conclusion, as I cannot believe that two ordinary contracting parties could possibly have contracted with the knowledge of this artificial distinction. The common understanding would naturally have been that, in the event of the debtor's insolvency, the guarantor would have the right to rank on his estate for the amount he would have to pay, and the creditor for the uncovered portion of his claim.

Of course, the Ogilvy firm had a clear right to prove for their whole claim, nothing having then been paid on the guaranty, and to receive dividends thereon.

BURTON, J. A. :—

The whole question in this case turns upon the construction to be given to the guarantee, and upon the state of things existing at the time it was given.

Judgment.

BURTON,  
J. A.

If this guarantee was a guarantee of the whole debt incurred, or to be incurred, with a limitation of the liability to \$2,500, the judgment of my brother Street was correct, and should be restored. If on the contrary, the true construction is, "I will be liable to that extent only upon the goods you may supply," it is a guarantee of that part only, and upon payment the surety would be subrogated to the rights of the principal as to that part.

I am hardly disposed to agree with my brother Street that the distinction is a narrow one, and entirely of form and not of substance; on the contrary, I incline to regard it as a most substantial distinction.

Whilst I quite agree that where the surety has given a continuing guarantee, limited in amount to secure a floating balance which may from time to time be due and *nothing more*, the *prima facie* construction is, that it is intended to be security for a part of the debt only, co-extensive with the amount of the guarantee, here, however, there is a good deal more. There is a reference to goods already sold, which it was contended on the part of the respondents, was ambiguous and might mean goods then being sold, and not a past sale, which might be of importance if that particular lot of goods formed the consideration for the guarantee.

It formed in fact no part of the consideration, and might be read thus: "I hear that you have sold goods to McGachie Bros. of Woodstock, and in consideration of your continuing to supply them, etc., I hereby undertake to guarantee you against all loss in respect of such goods so sold, or to be sold, provided I shall not be called on in any event to pay a greater amount than \$2,500."

There was no necessity for extrinsic evidence for the purpose of deciding whether it was or was not a valid guarantee, but in order now to ascertain whether the guarantee was for the whole debt with a limitation as to the amount, or for a part only of the debt, it becomes necessary to ascertain what the fact was at the time the guarantee was entered into. It was stated before us, and



not disputed, that there was at that time an indebtedness exceeding the amount of the guarantee; but if there had been an omission to give evidence of that fact, there could be no difficulty in supplying that omission at any time.

It being then established that the debt then existing exceeded the guarantee, how can it be contended with any hope of success that the guarantee was for a specific part of that indebtedness? It comes within the very words of Lord Blackburn, in *Ellis v. Emmanuel*, 1 Ex. D. 157, 168, where he says: "There is no case that I am aware of which lays down that where the suretyship limited in amount is for a debt already ascertained which exceeds that limit, it is *prima facie* to be construed as a security for part of the debt only. And I have failed to see any principle on which such a *prima facie* construction ought to be adopted," and I do not see how that is at all weakened by the fact that the guarantee applied also to debts to be afterwards incurred.

I think, with great respect, that Mr. Justice Street's judgment was correct and should be restored.

Judgment.

BURTON,  
J.A.

MACLENNAN, J. A. :—

I am with great respect of opinion that this appeal should be allowed.

The guarantee was on the 8th of March, 1888, and it was against all loss in respect of goods sold, and of goods to be sold during the following twelve months, the surety however not to be called upon in any event to pay a greater amount than \$2,500.

The debtor made an assignment for the benefit of creditors under the Ontario Act on the 27th of May, 1889. The creditor proved his claim on the 7th of June following, and it has never been contested. On the 13th of July, 1889, the creditor called on the surety for payment, and on the 3rd of October he paid the \$2,500. Having done that, he sought to prove a claim upon the estate for that sum, and the question is whether he can do so. In strictness the

Judgment.  
MAULENNAN,  
J.A. plaintiff has an undoubted right to prove, for if the estate is sufficient to pay everybody, the plaintiff must be paid as well as others. The real question is how the plaintiff is to rank in respect of dividend, whether he is to take the place of the creditor, and to stand in his shoes in respect of the dividend on \$2,500, parcel of the debt, or whether he is excluded altogether from dividend until the creditor has been paid the balance due to him, allowing for what he has received from the surety.

If the plaintiff had paid the \$2,500 before the creditors had proved their claims, it must be conceded that the plaintiff could have proved for the \$2,500, and Ogilvy & Co. could only have proved for the balance, for to the extent of that sum the latter would have ceased to be creditors, and the plaintiff would have become a creditor in their place.

The matter is entirely different however after Ogilvy & Co. had proved. The moment they had done so they obtained a vested right to a rateable proportion of the trust estate, in proportion to their whole debt, to be applied in satisfaction of it, and that right could not be qualified or impaired by subsequent payment of part by the plaintiff. It is true that the plaintiff upon payment of the amount of his guarantee became a creditor of the principal debtor, and could sue him at once for it, but it does not follow that he could claim a share of the trust estate otherwise than *sub modo* as above indicated, and so as not to interfere with the rights of other creditors, or with those which Ogilvy & Co. acquired by their proof. It would be a violation of the terms of the trust that dividends should be paid to two persons in respect of the same debt or the same part of a debt.

The question we have to determine is this: the creditor having before any payment by the surety obtained security for his debt, or part of it, in the form of a proportionate share of the debtor's estate, whether the surety can, upon afterwards paying the amount of his liability, claim to participate in that security before the creditor has been paid in full.

The cases which have been cited are cases in which the creditor had proved or had obtained dividends on the bankruptcy of the debtor, but the principle involved seems to be a general principle of equity, applicable to all cases of suretyship.

In *Thornton v. M'Kewan*, 1 H. & M. 525, before Lord Hatherley, a case of administration of the estate of a deceased debtor, and not one of bankruptcy, the principle is thus expressed in the head note: "Where a limited guarantee has been given, and the limit has been exceeded by the guarantee, who afterwards receives from the estate of the principal debtor a dividend, the guarantor is entitled to the benefit of a proportional part of that dividend on the amount guaranteed, notwithstanding that the unpaid debt greatly exceed the amount of such guarantee."

This statement of the law is approved by Jessel, M. R., in *Goodwin v. Gray*, 22 W. R. 312, and it is stated in similar terms in Coote's *Law of Mortgages*, 5th ed., p. 1227, and De Colyar on *Guarantees*, 2nd ed., p. 299.

The sole question here, therefore, is whether this is a guarantee of a limited part of the debt, or a guarantee of the whole debt with a liability limited to \$2,500. See the language of Lord Blackburn, *Ellis v. Emmanuel*, 1 Ex. D. at pp. 163-4.

After the most careful consideration of the language of this instrument as applied to the state of matters at the time it was given, I have come to the conclusion that it is a guarantee of the whole debt with a limited liability. It is against all loss in respect of goods sold, or goods to be sold within twelve months from date. I think the instrument is in terms made applicable to the state of the account between the parties at its date, whatever that was. If the surety did not know how the account stood when he signed the guarantee, he took the risk of it whatever it was, and I think we are bound to construe it with reference to the actual state of affairs. Then there is a date named beyond which there is to be no further liability. But as regards goods supplied before the making

Judgment.

MACLENNAN,  
J.A.

Judgment. of the instrument, and others supplied during the following twelve months, the surety guarantees the creditor against all loss. I do not know how the parties could have employed stronger language to indicate that the whole of the debt to the end of the twelve months, including the old account, was intended to be secured. Then came the limiting words. It is not that he is only to pay a part of the debt or of the loss, but no greater amount than \$2,500. I think the words "against all loss," are entitled to great weight as indicating that it was not merely part of the debt which was to be secured.

Agreeing as I do with the very able judgment of my learned brother Street, it is not necessary for me to repeat what he has said. I think that the appeal should be allowed, but that the original judgment should be varied by allowing the proof of the plaintiff qualified as above indicated.

OSLER, J. A.:—

We have the authority of Lord Cairns, Lord Blackburn and the present Master of the Rolls, in *Ellis v. Emmanuel*, 1 Ex. D. 157, for saying that when there is a limited suretyship to secure a floating balance, the suretyship is *primâ facie* at least to be construed as a security for part of the debt co-extensive with the amount of the guarantee; and that in such a case the ordinary rule applies (which is fully and clearly stated in *Burge on Suretyship*, p. 326) that when a surety is only surety for part of the debt, and has paid that part, he is entitled to receive the dividend which the principal debtor pays in respect of that sum which the surety has discharged. It is said also that "if a creditor taking a limited security for a floating balance, means it to be a security for the whole of the debt, and not merely for a part, he should take care that this is clearly expressed, for the *primâ facie* construction is the other way." Lord Hatherley's observations in *Hobson v. Bass*, L. R. 6 Ch. 792, are approved of, where he says: "If



Judgment.

OSLER,  
J. A.

a person guarantees a limited portion of a debt, all the authorities shew that if he pays that portion, he has in respect of it all the rights of a creditor. The question is, whether the guarantee means 'I will be liable for £250 of the amount which A. B. shall owe you,' or 'I will be liable for the amount which A. B. shall owe you, subject to this limitation, that I shall not be called upon to pay more than £250.'"

Where, however, the suretyship, limited in amount, is for a debt already ascertained which exceeds that limit, the *primâ facie* construction referred to, does not prevail. "In such a case," says Lord Blackburn, "it is a question of construction on which the Court is to say whether the intention was to guarantee the whole debt, with a limitation on the liability of the surety, or to guarantee a part of the debt only."

Taking this instrument simply as it is expressed, it appears to be a limited security for a floating balance in respect of goods already sold, or to be sold during the next succeeding twelve months. Certainly it is not *expressed* in the terms of Lord Hatherley's second example: "I will be liable for the amount which M. shall owe you, subject to this limitation, etc." Is that its meaning? Does its language necessarily require that construction to be placed upon it? With all respect, I think that to give it that construction or meaning is to convert the loose and common terms of a business document into a formal technical expression of liability, involving consequences which neither party ever dreamt of. We are not justified in paraphrasing the simple expression "guarantee you against all loss in respect of such debt," into a formal contract to be liable for the whole debt. The instrument is to be looked at as a whole in order to ascertain whether that was the guarantor's meaning—his clearly expressed intention—and, if there is nothing more than that expression combined with a limitation, however worded, of the guarantor's liability, the general rule, founded on the principle so fully explained (though not applied) in *Ellis v. Emmanuel*,

Judgment.

OSLER,  
J.A.

1 Ex. D. 157, and other authorities there cited, for the construction of the instrument is that it must be taken to be a guarantee of part of the debt only. We are not to make nice verbal distinctions on the words used, and the ordinary rule—the *primâ facie* construction—must apply, unless the surety has clearly contracted himself out of what would otherwise be his right—unless, to adopt the language of Mellish, L. J., in *Gray v. Seckham*, L. R. 7 Ch. 680, we can infer from the form of the contract or the circumstances of the case, that he has agreed that any dividend which he might otherwise be entitled to in the event of the debtor's making an assignment, should go to the secured creditor until he had received one hundred cents in the dollar.

It is certainly remarkable that the distinction referred to has not been held to exist as against the surety in any of the reported cases from *Ex parte Rushforth*, 10 Ves. 409 (1806), down to *Ellis v. Emmanuel*, 1 Ex. D. 157, (1876), a strong indication to my mind that, in construing informal instruments of guaranty, such as we are here concerned with, containing no express stipulation in favour of the creditor, the substance of the transaction has always been regarded and the general rule applied and acted on. Mellish, L. J., in the case of *Gray v. Seckham*, L. R. 7 Ch. 680, points out that, while it is now not unusual for contracts of guaranty to be expressly worded so as to shew that it is intended that dividends may be retained by the creditor, yet that the introduction of such provisions is a modern invention.

I think we cannot infer that in this guaranty the surety meant to become technically liable for the whole debt and thus to abandon his rights—to contract himself out of his equity as it has been said—merely because it is expressed as being a guaranty “against all loss” in respect of the goods sold or to be sold, or because the limitation comes in as a proviso following the obligatory part of the instrument—the whole being informally and loosely expressed. Apart from its being a guaranty in respect of goods

already sold, it is not fairly distinguishable from the guaranty in *Thornton v. McKewan*, 1 H. & M. 525, the words of which were: "In consideration of your advancing to S. the sum of £5,000 from time to time as he may require, I hereby guarantee and hold you harmless against any loss that may arise to you in consequence of such advances, and this obligation shall be a continuing guaranty to the extent of £300." Page-Wood, V. C., held that there was nothing sufficiently special in the guaranty to take it out of the general rule. No effect was given to the words "guarantee you against any loss in consequence of such advances" as extending the surety's liability or restricting his rights. They are strictly the equivalent of the expression "guarantee you against all loss in respect of such goods," which seems to be alone relied upon in the able judgment of Street, J., as shewing an intention to guarantee the whole debt. The application of the guaranty to past advances or to goods already sold does not necessarily make a difference in its construction as is shewn by such cases as *Ex parte Rushworth*, 10 Ves. 409; *Paley v. Field*, 12 Ves. 435; *Raikes v. Todd*, 8 A. & E. 846, and many others which might be referred to.

In what I have said I have dealt, as I understand my learned brother Street to have done, simply with the terms of the guaranty. I hold it to be a continuing guaranty limited in amount to secure the floating balance which may be due to the creditor on the dealings guaranteed, and I find no words in it which take it out of the general rule—the *prima facie* construction—to be applied to such an instrument in reference to the question which is raised in this action. I refer to *Ex parte Miles*, 1 DeG. 623; *Ex parte Hope*, 3 M. D. & D. 720; *Midland Banking Co. v. Chambers*, L. R. 4 Ch., 398, and *Ex parte National Provincial Bank*, 17 Ch. D. 98.

With regard to the state of the principal debtor's account as bearing upon the construction or meaning of the guaranty, my learned brother Street does not refer to it, and the learned Chief Justice says: "No evidence was given at the

Judgment.

OSLER,  
J.A.



Judgment.

OSLER,  
J.A.

trial of the circumstances under which this guaranty was given, nor of the state of accounts at that time existing between Ogilvy & Co. and McGachie Bros., nor whether the guarantor had any knowledge of the state of such accounts." He, therefore, held that the guaranty was to be construed without any extrinsic aid. In this I entirely agree. No such evidence was given at the trial, though the plaintiff's counsel very earnestly pressed upon our attention an exhibit, which is said to have been filed in the Divisional Court, though no member of the Court alludes to it in his judgment. But it carries the case no further. It is not explained or vouched in any way, nor is it self-explanatory. Moreover, even if it could be said (which it cannot) that it shews a debt at the date of the guaranty already ascertained, which exceeded the limit—and it is used for that purpose so as to bring the case within the principle of *Ellis v. Emmanuel*, 1 Ex. D. 157, yet there is no evidence that the surety knew what was the state of the account or what was then due for goods already sold. In the absence of such evidence, no inference unfavourable to the surety can be drawn. Unless he meant formally to guarantee the whole debt restricting his liability, it was of no consequence that he should know the amount of that already incurred, as he would naturally deem himself sufficiently protected by the express limitation, and unless he did know it, there is nothing extrinsic to the guarantee to shew an intention on his part to waive or abandon what, upon its face, I must hold to be his ordinary right. But whether there was a debt exceeding the limitation due at the date of the guarantee or not, the case differs from *Ellis v. Emmanuel*, 1 Ex. D. 157, in this, that the guaranty is nevertheless for the floating balance on that debt and the subsequent dealing between the parties. In *Ellis v. Emmanuel*, 1 Ex. D. 157, the security was given for the whole of an ascertained debt expressed in the instrument, and the Court arrived at the conclusion from the express and special terms used, that the intention of the several sureties was to guarantee the whole with a limitation upon



the liability of each. As regards the power to compromise the debt without affecting the surety's liability, I agree with the learned Chief Justice of the Queen's Bench that it does not control or extend the meaning of the guaranty. It amounts to no more than a permission to the creditors to do what in the absence of such power would have discharged the surety, and merely shews that in the case of a compromise between debtor and creditor, the surety still holds himself liable for the balance of the debt to the extent of \$2,500. On the whole, it appears to me that the judgment is right, and that we should dismiss the appeal.

Judgment.

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OSLER,  
J.A.

*Appeal allowed with costs, OSLER, J. A., dissenting.*

## IN RE LOCAL OPTION ACT.

*Intoxicating liquors—Constitutional law—Liquor License Act—Local option—Sale by wholesale—Sale by retail—53 Vic. ch. 56, sec. 18 (O.)—54 Vic. ch. 46, sec. 1 (O.)*

Section 18 of 53 Vic. ch. 56 (O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature, as is also section 1 of 54 Vic. ch. 46 which explains it, but the prohibition can only extend to sale by retail.

A by-law omitting to provide a penalty for its violation is not necessarily bad.

## Statement.

PURSUANT to the provisions of 53 Vic. ch. 13 (O.), "An Act for expediting the decision of Constitutional and other Provincial questions," the following questions were referred to this Court for determination.

1. Had the Legislature of Ontario jurisdiction to enact the 18th section of the Act passed in the 53rd year of Her Majesty's reign, chaptered 56, and entitled "*An Act to improve the Liquor License Laws?*"

2. Or had the Legislature jurisdiction to enact the said section as explained by section 1 of 54 Victoria, chapter 46?

3. Has the council of a township, city, town and incorporated village authority to pass by-laws for prohibiting the sale of liquors in the original packages in which the same have been received from the importer or manufacturer; provided that the by-law before the final passing thereof has been duly approved by the electors of the municipality in the manner provided by the sections in that behalf of the Municipal Act?

4. Is a by-law in terms of section 18 of 53 Victoria chapter 56, or as explained by section 1 of 54 Victoria chapter 46, invalid, where the by-law does not provide a fine or penalty for sales contrary to its provisions?

The sections in question are as follows:

53 Vic. ch. 56 sec. 18:—

"Whereas the following provision of this section was at the date of Confederation in force as a part of *The Consoli-*

*dated Municipal Act*, (29 & 30 V. c. 51, s. 249, sub-s. 9) <sup>Statement.</sup> and was afterwards re-enacted as sub-s. 7, of s. 6 of 32 V. c. 32, being *The Tavern and Shop License Act of 1868*, but was afterwards omitted in subsequent consolidations of *The Municipal* and *The Liquor License Acts*, similar provisions as to local prohibition being contained in *The Temperance Act of 1864*, 27 & 28 Vict., c. 18; and the said last mentioned Act having been repealed in municipalities where not in force by *The Canada Temperance Act*, it is expedient that municipalities should have the powers by them formerly possessed; it is hereby enacted as follows:

The council of every township, city, town and incorporated village, may pass by-laws for prohibiting the sale by retail of spirituous, fermented or other manufactured liquors, in any tavern, inn or other house or place of public entertainment, and for prohibiting altogether the sale thereof in shops and places other than houses of public entertainment: Provided that the by-law, before the final passing thereof, has been duly approved of by the electors of the municipality in the manner provided by the sections in that behalf of *The Municipal Act*: Provided further that nothing in this section contained shall be construed into an exercise of jurisdiction by the Legislature of the Province of Ontario beyond the revival of provisions of law which were in force at the date of the passing of *The British North America Act*, and which the subsequent legislation of this Province purported to repeal."

54 Vic. ch. 46 sec. 1:—

"It is hereby declared that the Legislature of this Province by enacting section 18 of the *Act to improve the Liquor License Laws*, passed in the 53rd year of Her Majesty's reign, chaptered 56, for the revival of provisions of law which were in force at the date of *The British North America Act, 1867*, did not intend to affect the provisions of section 252 of *The Consolidated Municipal Act*, being chapter 51 of the Acts passed in the 29th and 30th years of Her Majesty's reign by the late Parliament of Canada,

Statement.

which enacted that 'No tavern or shop license shall be necessary for selling any liquors in the original packages in which the same have been received from the importer or manufacturer; provided such packages contain respectively not less than five gallons or one dozen bottles,' save in so far as the said section 252 may have been affected by the 9th sub-section of section 249 of the same Act, and save in so far as licenses for sales in such quantities are required by *The Liquor License Act*; and the said section 18 and all by-laws which have heretofore been made or shall hereafter be made under the said section 18, and purporting to prohibit the sale by retail of spirituous, fermented, or other manufactured liquors, in any tavern, inn, or other house or place of public entertainment, and prohibiting altogether the sale thereof in shops and places other than houses of public entertainment, are to be construed as not purporting or intended to affect the provisions contained in the said section 252, save as aforesaid, and as if the said section 18 and the said by-laws had expressly so declared."

Pursuant to leave given, counsel were heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, J.J.A.] on the 28th of May, 1891.

*Irving*, Q. C., and *J. J. MacLaren*, Q. C., for the Attorney-General for Ontario. The Act in question is identical with the Act of 1866, 29 & 30 Vic., ch. 51, sec. 249, sub-sec. 9, which was re-enacted immediately after confederation by 32 Vic. ch. 32 sec. 6, sub-sec. 7. The reason for omitting this enactment from the Consolidated Statutes was that similar provisions as to local prohibition were contained in the Temperance Act of 1864, 27 & 28 Vic. ch. 18; that Act being repealed by The Canada Temperance Act of 1878, 41 Vic. ch. 15 (D.) as to municipalities where it was not in force, it became necessary to restore to municipalities the power to deal with the matter. Under sec 129 of the British North America Act, sub-sec. 9 of



sec. 249, 29, 30 Vic. ch. 51, of which the section in Argument. question appears to be a re-enactment, is binding, unless it has since been repealed. The Dominion Parliament has not repealed it, and, unless the legislature of Ontario can re-enact it, it was not able to repeal it. *Sulte v. Three Rivers*, 5 (Montreal) Legal News 330; *Keeffe v. McLennan*, 2 Russell & Ches. 5; *Slavin v. Orillia*, 36 U. C. R. 159.

There is no distinction between wholesale and retail licenses, between the power of a shopkeeper to sell one bottle or twelve, and the Dominion License Act has been held *ultra vires*: *In re Liquor License Act*, 1883; Cassels' Digest p. 279. The decision of the Privy Council was that the Act was altogether bad except the adulteration clause. Therefore the Provinces have jurisdiction over liquor licenses: *Danaher v. Peters*, 17 S. C. R. 44; *Sulte v. Three Rivers*, 11 S. C. R. 25. *Russell v. The Queen*, 7 App. Cas. 829, and *Fredericton v. The Queen* 3 S. C. R. 505, do not affect the matter because these are both New Brunswick cases, and this law was not in force in New Brunswick at confederation.

The power to prohibit comes under the head of "municipal institutions" and these are the subject of provincial legislation, and have been so since the Consolidated Statutes of Upper Canada in 1859. In Lower Canada the law was the same; 29 & 30 Vic. ch. 32, sec. 2, gave full power to municipalities to prohibit; ch. 6 Con. Statutes of Lower Canada. As to Nova Scotia: Municipal institutions were not fully developed there at the time of confederation, but so far as the municipal system was in existence the power of prohibition had been vested in the local authorities.

A by-law is not inoperative though there be no penalty prescribed for its infraction. Townships may and sometimes do have general by-laws as to penalties. But the by-law is good without any such. At all events it cannot be questioned on that account: *Rex v. Westwood*, 4 B. & C. 786; *The King v. The Sheriffs of York*, 3 B. & Ad. 770; *Child v. Hudson Bay Co.*, 2 P. W. 207; *State v. Cleaveland*, 3 R. I. 117.

## Argument.

*E. R. Cameron, W. H. Blake and E. E. A. Du Vernet, contra.* The legislation of 1868, 32 Vic. ch 32, sec. 6 sub-sec. 7 is *ultra vires* so far as it deals with local option. Every particular Act of legislation must exclusively be the subject of either Dominion or Provincial legislation: *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. at p. 108; *Russell v. The Queen*, 7 App. Cas. at p. 836; *Hodge v. The Queen*, 9 App. Cas. at p. 130. It was argued in the case of *Russell v. The Queen*, that the local option parts of the Canada Temperance Act were *ultra vires*, but the contrary was decided in the case of *Hodge v. The Queen*. The legislatures have no power except that which was conferred on them by the British North America Act. The power exercised by local councils previous to Confederation have no bearing on the question. The Act of 1866 is repealed by R. S. C. at p. 2255, where the whole of ch. 51, except sec. 409, is repealed. See also 32 Vic. ch. 32, sec. 4 (O.) This repealed the Act of 1866. If not, Provincial legislation could not pass the Act. The power to repeal is co-extensive with the power to enact: *Dobie v. Temporalities Board*, 7 App. Cas. 136. In all legislation up to the present time the Provinces have recognized the power of the Dominion in regard to prohibition. The Act of 1874, ch. 32 sec. 9 expressly recognizes the provisions of the Temperance Act of 1864, 27 & 28 Vic. ch. 18. A declaration of the Provinces is evidence against them: *Regina v. Bush*, 15 O. R. at p. 402; *Citizens' Insurance Co. v. Parsons*, 7 App. Cas. 96. Before Confederation municipalities had power to prohibit by retail, and under the British North America Act the power to prohibit the sale of intoxicating liquors in the Province cannot be extended beyond the retail trade: *Russell v. The Queen*, 7 App. Cas. 829; *Regina v. Taylor*, 36 U. C. R. 183, where Wilson, J., at p. 196, points out, referring to the Act of 1866, sec. 249, sub-sec. 9, "that provision related only to a sale by retail." *Re Slavin and the Corporation of Orillia*, 36 U. C. R. 159; also *Severn v. The Queen*, 2 S. C. R. 70. It is apparent the object of 53 Vic. ch. 56, sec. 18, is total prohibition, and if

that be so the jurisdiction is excluded. The power to pro- Argument.  
hibit totally is within the power of the Parliament of  
Canada alone; firstly, because it is a regulation in regard  
to trade and commerce; and secondly, because, even if it  
were not a regulation in regard to trade and commerce, it  
is within the criminal law. Sec. 92 sub-sec. 2 of the British  
North America Act gives the Parliament of Canada the  
exclusive legislative authority for the regulation of trade  
and commerce. It has been expressly held by the Supreme  
Court in the case of *Frederickton v. The Queen*, 3 S. C. R.  
505, that the Parliament of Canada alone has the power to  
prohibit the traffic in intoxicating liquors. *The Queen v.*  
*Justices of Kings*, 2 Pugsley, 535; *The Queen v. Taylor*, 36  
U. C. R. 183. Prohibition is clearly within the criminal  
law. In legislation to promote temperance Parliament  
is dealing with the criminal law. It is not obliged to wait  
until liquor has been sold and intoxication ensues before  
dealing with this subject; to allow the cause and attack  
the effect. In finding a cause lawful in itself productive  
of criminal effect it can declare that cause to be an offence.  
Drinking liquor was not *per se* a criminal offence, nor was  
selling it any more so, nor was the carrying of arms in  
itself unlawful.

September 23rd, 1891. HAGARTY, C. J. O.:—

[The learned Chief Justice read the questions and continued:]

From an early period, at least as far back as 12 Vic. ch. 81 (1849), municipalities had the power to regulate tavern licenses and to limit their number.

In 1853, by 16 Vic. ch. 184, sec. 3, sub-sec. 2, they were given power to pass by-laws "for preventing absolutely the sale of wine, brandy or other spirituous liquors, ale or beer or any of them, by retail within the municipality," with a saving clause as to sale in original packages containing not less than five gallons.

In 1858, 22 Vic. ch. 99, sec. 245, sub-sec. 6, there is a

Judgment.

HAGARTY,  
C.J.O.

clause, identical with that re-enacted in the Statute on which our opinion is sought, for prohibition subject to the approval of the electors.

This is repeated in C. S. U. C. ch. 54, sec. 246 (1859), authorizing the prohibition of sale by retail. Then 23 Vic. ch. 53 (1860), limited the number of licences to be granted in municipalities, section 5 declaring that it was not to restrict municipal councils from further limiting the number or passing any other by-law under section 246 of C. S. U. C. ch. 54.

In 1864 the Legislature passed the Act, 27-28 Vic. ch. 18 (commonly called the Dunkin Act). Section 1 provided that the municipal council of every county, city, town, township, etc., should have power to pass a by-law for prohibiting the sale of liquor and the issuing of licenses within such county, etc., and full provision was made as to its being approved by the electors. Section 2, sub-section 3, allowed distillers and brewers to sell in not less than certain named quantities. The brewers and distillers' clause still appears in R. S. O. (1887) ch. 194.

In 1866, in 29-30 Vic. ch. 51, sec. 249, sub-sec. 9, is the clause allowing a by-law for prohibiting the sale in taverns by retail, and for prohibiting totally the sale thereof in places other than houses of public entertainment, and this clause is identical with the clause now in question. Section 252 declares that no license shall be necessary for selling liquor in original packages.

Confederation took place on the 1st of July, 1867.

The first Ontario legislation seems to be 1869, 32 Vic. ch. 32: "The Tavern and Shop Licenses Act." Section 6 empowers municipalities to pass by-laws in terms identical with the clause in question. See sub-section 7.

Section 40 repeals the sections 249 to 263 of the Act of Canada of 1866, cited above. This section 249 is that allowing such a by-law before Confederation, and thus the same statute repealing the clause re-enacts it in the same terms.

So things remained under the last Act from 1869 to 1874.



In 1874, 37 Vic. ch. 32, amended and consolidated another Act, not bearing on this point, and the prohibition clause was omitted in declaring the powers (section 9) of municipalities in counties where the Temperance Act of 1864 was not in force, leaving however the power to regulate and to define the conditions and qualifications requisite for obtaining licenses and the power to limit the number. And see 40 Vic. ch. 18 (O.), and R. S. O. (1877), ch. 182.

Judgment.  
HAGARTY,  
C.J.O.

53 Vic. ch. 56 is an Act amending the Liquor License Laws. Section 18 is as follows:

[The learned Chief Justice read the section and continued:]

We must notice the Canada Temperance Act of 1878, a Dominion Act whose validity has been affirmed in the Privy Council, 41 Vic. ch. 16.

It takes up the general principle of the Canada Act of 1864 (called the Dunkin Act). It extends over the Dominion, and provides an elaborate set of provisions for taking the votes of county and city electors on the proposed prohibition by-law, and provides for the repeal in certain cases of similar by-laws, under the Act of 1864.

It contains most stringent provisions against the sale or barter of every intoxicating liquor.

Sec. 99, sub-sec. 2, provides that no license to distillers or brewers, nor to any steamboat or vessel, nor any other license shall avail against any violation.

Sub-section 3 provides for its use for sacramental or medicinal purposes. Sub-section 5 provides that any cider producer or licensed distiller or brewer in a prohibition county or city may sell at his premises, not under specified quantities, only to druggists or others licensed or to persons who he has reason to believe will forthwith carry the same beyond the limits of the prohibition district. By sub-section 6 leave is giving to companies making native wine to sell it in certain quantities.

By sub-section 7 manufacturers of native wine when authorized so to do by license from the municipal council

Judgment.

HAGARTY,  
C.J.O.

or other authority having jurisdiction where the manufacturing is carried on may sell the same in named quantities.

By sub-section 8 a merchant or trader exclusively in wholesale trade, when duly licensed to sell liquor by wholesale, may sell in named quantities to druggists or to persons who as he believes will forthwith carry the same out of the county, etc., etc.

It is clear that no license can avail against any violation of the Act except within the allowed limits.

The Act contemplates the issuing of licenses to brewers and distillers and manufacturers of native wine.

For at least thirteen years prior to Confederation municipalities had this power of prohibiting the sale of liquor. The power existed at Confederation and was continued by Ontario legislation in "The Liquor License Act" down to 1874. The Dominion Act then interposed.

Now the Ontario Legislature revives the dropped clause.

Under the Confederation Act "Municipal Institutions in the Province" are in the class of subjects within exclusive provincial regulation.

It may be safely said that there is no apparent intention in the Confederation Act to curtail or interfere with the existing general powers of municipal councils, unless the Act plainly transfers any of such existing powers to the Dominion jurisdiction.

Where either the Legislature of Canada before, or the Dominion Parliament after, Confederation provided enactments as to prohibition inconsistent with the municipal regulations, the latter must give way.

When either under the Act of 1864 or of 1878, a county passed a prohibition Act the powers of a township so to do would be at least in abeyance.

I read the clause 18 restoring the old powers to the municipality to apply only to places where neither of these Acts is in force, and to apply only so long as the Dominion Act shall not be applied to it.

The local Legislature specially disclaim any exercise of jurisdiction beyond the revival of provisions in force at Confederation.

As I understand the various interpretations given to the Confederation Act in its distribution of legislative powers, in the Privy Council and in the Supreme Court, and without attempting to cite from the voluminous authorities on the subject, I arrive at the conclusion that the Legislature of Ontario had jurisdiction to pass the 18th section.

The effect is to leave the power of prohibition in the municipalities as it was for so many years before and at the time of the Imperial settlement of the constitution of our Dominion.

I do not overlook the question raised as to this being an alleged interference with "Trade and Commerce." See *Russell v. The Queen*, 7 App. Cas. 829. The opinion of the Supreme Court in that case, that a general law like the Canada Temperance Act, came within the exclusive power of the Parliament of Canada, is thus noticed, the Privy Council declaring that they must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who also held that the Act, as a general regulation of the traffic in intoxicating liquors throughout the Dominion, fell within the class of subject "The regulation of Trade and Commerce" enumerated in that section, and was on that ground a valid exercise of the legislative powers of the Parliament of Canada.

The Privy Council decided the case on other grounds.

I am wholly unable to see how the power granted to township municipalities to prohibit the retail sale of liquor by any reasonable construction comes within the words "Trade and Commerce" as used in the Federation Act. The power, as already pointed out, had been for many years vested in the townships. If such a construction prevail it would seem to me to interfere most extensively with many powers granted by our Municipal Acts. They are full of provisions not only for licensing but for regulating, governing, and in many cases preventing acts locally affecting trade and commerce in the locality, such as: Auction sales of goods; hawkers and peddlers; regulating

Judgment.

HAGARTY,  
C.J.O.

Judgment.

HAGARTY,  
C.J.O.

ferries; for preventing exhibitions held or kept for hire or profit; bowling alleys, and other places of amusement; limiting the number of victualling houses; regulation of markets and the sale of certain goods therein, and on the streets—most extensively interfering with the rights of sale and trading in cities and towns; for regulating and preventing various manufactories; preventing dangerous trades; forestalling and regrating, etc., etc.

All these powers existed at confederation, and I am of opinion that there can be no interference with such power by any fair interpretation of the words "Trade and Commerce."

I arrive at these conclusions in my view of this prohibitory clause. I read it as it stands in the Act of 1868, and in connection with the rest of that Act, and especially with the 252nd section.

Although it uses the words "prohibiting totally the sale thereof" I think these words must refer to the preceding words which deal with the selling by retail, and merely prohibit such selling in every place.

The subject of the legislation in the Act was the granting of shop and tavern licenses, for limiting their number, etc., and councils are allowed to prohibit the sale by retail in inns or houses of entertainment, and wholly to prohibit the sale thereof in shops and places other than houses of public entertainment. I read this as necessarily confined to the retail trade, which is the subject dealt with, and for which a license is required.

Then when section 252 declared the general law to be that no license should be required to sell in packages of not less than five gallons, it could not I think be intended that such rights should be destroyed under the wording of the prohibitory clause, or in other words, that such clause extended to the sale of liquors in manufactories within the municipality in the specified larger quantities. I think the general wording of the Act and its general clauses clearly indicate that this prohibitory clause is dealing solely with the retail business. The practice of "drinking,"



as generally understood in the country, is aimed at, whether it may occur in tavern, shop or any place.

Judgment.  
HAGARTY,  
C.J.O.

I think it to be a strained and unnecessary construction to apply it to all the dealings of brewers and distillers in the sale of their goods in the ordinary course of their business. If they sell in the style of the tavern-keepers in the retail drinking business they bring themselves within the by-law.

The late Sir William Richards, in his judgment in *In re Slavin and Orillia*, 36 U. C. R. 159, clearly recognizes the meaning of the section to be confined to the retail business.

So construed it can hardly be said to infringe on the subject of "Trade and Commerce" which belongs to Dominion authority.

The following question has also been submitted for our opinion.

[The learned Chief Justice read the third question and continued:]

I cannot but regret that it should be thought proper to submit such a question to this Court.

It is not a question as to any course or action taken or to be taken by the Executive Government, but it refers wholly to the course to be adopted by the municipal authorities in the introduction and passing of their by-laws.

It is in effect the same as asking a definition of the powers of assignees in insolvency, or of sheriffs, registrars, or of railway or other companies chartered by the Province.

I think, with much respect, that a perusal of the Act of 1890, ch. 53, would not lead ordinary minds to the opinion that although the letter authorizes the submission of "any matters which he (the Lieutenant-Governor) thinks fit to refer," it would be reasonable to expect this application of the general language to questions, not as to the validity of acts of the Legislature or the Executive, but as to the acts of municipal or trading corporations or of any class of officials.

The Legislature in the late Act, 54 Vic. ch. 46, disclaims

Judgment.

HAGARTY,  
C.J.O.

all interference with the 252nd section of the Municipal Act, 29-30 Vic. ch. 51, passed by Canada, as to tavern or shop licenses being required for the sale of liquors in the original packages of not less than five gallons or one dozen bottles, save in so far as modified by sub-section 9 of section 249, being the section as to by-laws for prohibition. No notice is taken of the repeal by the Local Legislature of this 252nd clause and a large number of others by the statute 32 Vic. ch. 32.

This leaves it, as I understand, conceded that the brewers and distillers' clause remains still the law of the land. If so I consider that they may sell the quantities mentioned in the original packages; in other words, that the municipality cannot interfere with their action. After so selling it would then seem to follow that the purchaser could not retail the contents or sell after bulk broken. But the words of the section 252 go further and appear to authorize a sale of the original packages as received from the manufacturers, that is, the distillers. If this section be held to govern it will have this construction.

I think the intention of the legislatures, both Federal and Provincial, has been throughout to preserve the trade interests of brewers and distillers as distinct from the retail dealers.

I therefore answer the third question in the negative.

As to the fourth question, I answer it in the negative. I do not consider that a by-law omitting to provide a penalty is necessarily bad. It may be ineffective, but I do not think any Court would quash it on any such ground. Besides there might be some general law in existence providing for penalties under all by-laws.

BURTON, J. A. :—

This is a somewhat novel proceeding, under a recent Act of Parliament, not unprecedented to a limited extent even in England, but rendered more necessary here in consequence of the great variety of constitutional

questions which are constantly arising under our federal system, and the injustice of subjecting individual litigants to the delay and expense of having them decided in the particular suits in which they are interested; and if confined to important questions it would seem to be a very salutary piece of legislation.

Judgment.  
BURTON,  
J.A.

The questions raised here are in my opinion of that character.

There has been at various times a great diversity of opinion upon them, and that probably still exists to a considerable extent. These questions have been already stated by the learned Chief Justice, and I need not repeat them.

The argument took a much wider range than would appear to be strictly requisite for a determination of the questions submitted, and the learned Chief Justice has quoted very largely from the statutes previous to Confederation, for the purpose of showing that the right to prohibit was vested in the municipal bodies at that time, and much of the argument was based upon that fact. I have also travelled over more ground than is strictly necessary, believing that I can thereby make my conclusions, and my reasons for those conclusions, more clear and distinct.

It does not suggest itself to my mind as at all conclusive in favour of the power of the Local Legislature to deal with the subject of prohibition under the words "municipal institutions," that provisions in reference to that subject were, at the time of the passing of the Confederation Act, to be found in our own Municipal Acts, and had been so for many years.

It must not be forgotten that the Legislature of the old Province of Canada which passed those Acts had plenary powers of legislation, including the power to regulate trade and commerce, to deal with the criminal law, and in fact all the powers which are now distributed between the Parliament of the Dominion, and the Legislatures of the Provinces.

Judgment.

BURTON,  
J.A.

Having that power it was clearly competent to the Legislature to confide to a municipal council or any other body of its own creation, or to individuals of its selection, authority to make by-laws or resolutions as to subjects specified in the enactment, with the object of carrying it into effect; and the provision in question being found therefore within a Municipal Act in one of the Provinces furnishes no conclusive evidence that by the words "municipal institutions" it was intended to confer every power which might be contained in such an Act upon the Legislatures of the Provinces.

It is proper to enquire therefore what was the extent of the grant given under that designation.

Does it mean only the creation and erection of municipalities with such powers as are of the essence of municipal institutions, and necessarily incident to and essential to their existence, or does it include the powers and functions which, at the time of Confederation, were ordinarily exercised to a greater or less extent by the municipalities of all the Provinces?

It may not without some reason be contended that there is no inherent connection between the liquor traffic and municipal institutions, which is perfectly true, but there was, if I may so express myself, a constitutional connection. In, I believe, all the Provinces the power to regulate, by the granting licenses to sell, intoxicating liquors existed; whilst in many the power to regulate even to the extent of prohibiting it altogether existed as a matter of police or municipal regulation, so that we have to regard it in the view that at that time the regulation and prohibition had come to be regarded as municipal regulations which were guaranteed to the Provinces under Confederation, and made part of their rights by section 92.

I come therefore individually to the conclusion, although this point has not as yet been passed upon by the Judicial Committee, that under the term "municipal institutions" the Local Legislatures' power to prohibit was included; and if the power, the exclusive power to deal with this question.



Being then a matter of that kind, and one of a merely local nature, that is to say, confined to the Province, the onus is on those who contend that it is *ultra vires* to show that it comes within the powers granted to the Dominion in the 91st section.

Judgment.

BURTON,  
J.A.

The *ratio decidendi* in *Russell v. The Queen*, 7 App. Cas. 829, in the Privy Council proceeded, as I understand it, upon this principle :

The Judicial Committee there held that the case fell, *primâ facie*, within section 91 under the general power (in addition to the enumerated powers) to make laws for the peace, order and good government of Canada, and it became necessary, therefore, to ascertain whether it also fell within the enumerated classes of subjects in section 92 assigned exclusively to the provincial legislatures.

It appears upon the face of the judgment that there were only three classes of subjects under which the appellants' counsel contended that the case came under section 92, viz. :

1. Shop and tavern licenses for the raising of a revenue.
2. Property and civil rights in the province.
3. Matters of a local and private nature within the province.

It is perfectly clear that it did not fall within any of these.

I have gone to the trouble of obtaining the factum or case presented to the Judicial Committee in that appeal, and find that no reliance was placed on sub-section 8, but it was mainly argued that the power of the Province to deal with the question was derived from sub-section 9, and Sir Richard Couch in commenting upon it in a subsequent case says : "I do not recollect section 8 being relied on. I think all the clauses that were relied upon in the argument are noticed in the judgment."

It is perhaps not a matter of surprise that sub-section 8 was not quoted in the factum when we recall the fact that the case arose in the Province of New Brunswick where the municipal powers conferred by the legislature appear

Judgment. to have been of a more restricted nature than in some of the  
BURTON, other Provinces, and not to have expressly authorized pro-  
J.A. hibition, and it may have been supposed that the municipi-  
ality had only power to regulate in a particular way. Be  
that as it may, the Privy Council do not appear to have  
had their attention drawn to it.

It is sometimes said that although this sub-section 8 was not called to the attention of the Judicial Committee in *Russell v. The Queen*, that that case was reconsidered and affirmed in *Hodge v. The Queen*, 9 App. Cas. 117, but the same remark applies to that decision. The Judicial Committee were not in that case considering, nor would their attention be drawn to that sub-section nor to 29-30 Vic. c. 51, sec. 249 sub-sec. 9. The question there arose under the provisions of the Ontario Liquor License Act of 1877, which dealt with a totally different matter. I consider it as a mere affirmance of the principle of decision laid down not only in *Russell v. The Queen*, but in a number of other cases, and I venture very humbly to submit that if this sub-section 8 had been brought to their Lordships' attention and they had placed the same interpretation upon it which I have done, it would have followed as of course that for the reasons given in that judgment that decision would have been different.

And now, I wish to notice a point upon which I think a good deal of misconception has existed. It has never been suggested in the Judicial Committee (although I have seen some such opinion expressed in other quarters), that in any case which comes under the residuary legislation of the Dominion, that legislation can in any sense override a subject which comes under the specific enumeration contained in section 92.

Thus *primâ facie* in the *Russell Case* under the words "peace order and good government" of Canada the power would exist to pass a prohibitory liquor law, but when ever you find in section 92 "municipal institutions" interpreted as we are interpreting them, the right of the Dominion to legislate upon the subject is displaced;

otherwise, as remarked by Mr. Justice Strong, the Dominion Parliament by generalizing a law and making it applicable to the whole Dominion could nullify the powers reserved to the provinces under the Constitutional Act. And he quotes in confirmation of his opinion a question put to counsel by the President of the Privy Council "Do you mean that by generalizing the powers contained in section 92, the Dominion Parliament can take away the powers of the Local Legislature?" A moment's consideration will show that they possess no such power.

I think the principle must be clear that neither the Dominion Parliament nor the Local Legislature can attract to itself a jurisdiction in matters assigned exclusively to the other power by the mere device of enlarging the geographical area so as to include the whole of the provinces, nor in the other case by restricting the area within which the power is to be exercised.

And I wish to add that there is no such thing as overlapping contemplated in the Act, nor any such principle as Local Legislation giving way to or being over-borne by Dominion Legislation, as would appear sometimes to occur in the Courts of the United States, except in the two cases provided for by section 95. With the exception of those two cases the distribution of legislative functions is of an exclusive character, and being exclusive, if it falls within the jurisdiction of one Parliament it is necessarily excluded from that of the other. Once we find that the power to regulate or prohibit the sale of intoxicating liquors is given under section 92, it must be read as an exception to section 91, which would then read: the Parliament may make laws for the peace, order, and good government of Canada, but this is not to interfere with the right granted exclusively to the Local Legislatures to regulate the liquor traffic.

That this is the view taken by Lord Hobhouse in the Privy Council appears where he says that *Russell v. The Queen* does not intend to decide that if the subject is one attributed to the Provincial Legislature the Dominion can get seizin of it by extending it beyond the province.

Judgment.

BURTON,  
J.A.

Judgment.

BURTON,  
J.A.

The two cases mentioned in section 95 are agriculture and immigration where the powers are concurrent, and here of course provision had to be made for one or other giving way in the event of their clashing, and so it is specially provided that the Local Legislation in those two cases should be valid only so far as it does not conflict with that of the Parliament of Canada.

There is in my opinion no general rule or principle, and no ground for the contention that I have sometimes heard advanced, that in case of conflict the legislation of the Dominion must prevail; on the contrary there can be no such conflict. Each is supreme upon the subjects entrusted to it, and it was assumed in the Imperial Act that there could be no conflict except in the two enumerated cases.

If for the reasons I have mentioned this subject does fall within sub-section 8 as a portion of the municipal institutions of the province, is there anything in any of the powers assigned exclusively to the Parliament of Canada to conflict with it?

The only one which can by any stretch of interpretation be held to do so is that relating to the regulation of trade and commerce, and many of the remarks I have made will equally apply to this branch of the case.

If I am correct in assuming that the right to pass a prohibitory law exists in the Local Legislature, even if it does incidentally affect trade and commerce, it must be held, in the language of that eminent and lamented judge the late Chief Justice Dorion, that this incidental power is included in the right to deal with it; in other words, the right so to deal with trade and commerce must be regarded as an exception to the general power.

I should not regard the words "regulation of trade and commerce" in their unlimited sense, even if uncontrolled by the context in section 92 and other parts of the Act, as extending to such a regulation as a prohibitory liquor law in a province, but read in connection with sub-section 8 of section 92, they must, I think, be read as if it had contained a proviso to this effect, "but so as not to inter-



fere with the right reserved exclusively to the provincial legislature to prohibit the sale of intoxicating liquors.”

Judgment.  
BURTON,  
J.A.

That is the rule of interpretation laid down by the Privy Council in a very early case, viz., that sections 91 and 92 are to be read together, and the language of one interpreted, and where necessary modified, by that of the other.

This would be my view were I at liberty to state my own opinion, but as at present advised I think we are bound by the decision of the Supreme Court in *City of Fredericton v. The Queen*, 3 S. C. R. 505, where that Court held, Henry, J., dissenting, that the power to deal with this subject was embraced within sub-section 2 relating to the regulation of trade and commerce. It is true that the decision in the Privy Council proceeded upon other grounds, but they say expressly, “We must not be understood as intimating any dissent from the opinion of the Chief Justice of the Supreme Court of Canada and the other Judges who held that the Act fell within that section.”

It seems to me that until expressly reversed or reconsidered that judgment is binding upon us, whatever may be my own opinion.

In the same way the judgment of the Judicial Committee, though based upon a state of facts which rendered any other judgment in my opinion impossible, is, until reconsidered upon the additional material to which I have referred, binding upon me as a judgment.

If therefore, we had been dealing with the general question as to the right of the Provincial Legislature to pass a prohibitory Liquor Law, I should have been constrained to hold such legislation, contrary to my own opinion, *ultra vires*; but the question is confined, as I understand it, to the power of the Legislature to re-enact sub-section 9 controlled, as it was supposed to be controlled at the time of Confederation, by section 252.

Sub-section 9 is not very clearly expressed, and I must confess that my first reading of it led me to the conclusion that it referred to two distinct matters: 1st, the prohibiting the sale by retail in any inn, and 2nd, the prohibi-

Judgment.  
BURTON,  
J.A.

tion altogether, whether by wholesale or retail in any place, but upon further reading the various Acts then in force relating to fermented or other manufactured liquor, and section 252, I am satisfied that the whole section was intended to be confined to sales by retail in inns, and such sales as were authorized by shop licenses, and I adopt my brother MACLENNAN'S reasoning upon this branch of the case. Being therefore, a mere police regulation for the sale by retail the enactment is not open to the possible objection to which I have referred.

I answer the two first questions therefore in the affirmative.

Question three I answer in the negative, assuming as I do that the question is confined to the power of those bodies under the enactments referred to in the two previous questions now reviewed.

As to question four I do not consider a by-law under these sections necessarily invalid because it omits to provide a penalty.

MACLENNAN, J. A. :—

The first matter to be considered is the extent of the enactment of the late Province of Canada, 29-30 Vic. c. 51, sec. 249, sub-sec. 9, which has been re-enacted by the Acts in question.

The first member of the enactment authorizes the prohibition of sales by retail in any tavern, inn, or other house of public entertainment. It leaves sales by wholesale untouched, and it does not interfere with sales in other places than inns and places of public entertainment. The other member of the section then appears to deal with *all* kinds of sales, not merely those by retail, and with *all* places except houses of public entertainment, and would seem to authorize total prohibition both wholesale and retail in all places within the municipality, with the single exception of houses of public entertainment. If that were the effect of the enactment it would seem to be very

strange, for then under the by-laws which have been laid before us, which have put both members of the enactment in force, liquor could still be sold in houses or places of public entertainment but only by wholesale, and could not be sold anywhere else either by wholesale or retail. The legislature could hardly have intended anything so absurd as that, and yet that would appear to be the meaning of the enactment standing by itself.

Judgment.

MACLENNAN,  
J.A.

I think, however, when the history of the legislation, the other co-existing enactments on the subject, and the context of the enactment itself are looked at, it will be quite apparent that the second member of the enactment must be construed as referring to sales by retail only, as well as the first, and that it was not intended thereby to confer any power on the municipalities to prohibit sales by wholesale.

The first power of actual prohibition, as distinguished from mere licensing which was conferred on municipalities was in 1853 when by 16 Vic. c. 184, sec. 3 (2), townships, villages and towns were authorized to pass prohibitory by-laws, but that prohibition was distinctly confined to sales by retail; and it was declared that selling in the original packages, in which the liquor was received from the importer or manufacturer, and not containing respectively less than five gallons, or one dozen bottles, should not be held to be a selling by retail.

The law remained in this state until the year 1858, when by the Consolidated Municipal Act of that year, 22 Vic. ch. 99, sec. 245, sub-sec. 6, the enactment was cast substantially into the form which is now before us for consideration.

After that the clause was twice re-enacted, first in the Consolidated Municipal Act of 1866, sec. 249, sub-sec. 9, and again in the year 1869, by 32 Vic. ch. 32, sec. 6, sub-sec. 7; but there was a slight change made in these two re-enactments by the insertion of the word "totally" in the Act of 1866, and the word "altogether" in the Act of 1869, after the word "prohibiting" in the second member of the enactment.

Judgment.  
MACLENNAN,  
J.A.

I think it is very clear that as the clause stood in the Act of 1858 it left the law as to sales by wholesale untouched. It meant no more than this : municipalities may prohibit sales by retail in public-houses, and they may also prohibit such sales in shops and other places. The prohibition of retail sales might be confined to public-houses, or it might be extended to shops and all other places throughout the municipality, the kind of sale which was meant to be dealt with in the second part of the clause, being the same kind that was described in the first, namely, sale by retail.

The meaning and use of the words *totally* and *altogether* introduced in the subsequent re-enactments are not at first sight obvious. But that becomes apparent on examining sub-section 1, which defines shop licenses as licenses for the *retail* of liquor in quantities not less than a quart, in shops, stores or places other than inns or places of public entertainment. By sub-section 1, sales in shops, stores or places other than inns, etc., are prohibited in quantities less than a quart, unless under license ; but by sub-section. 9, sales in such places may be prohibited *totally* or *altogether*. The shopkeeper's power of selling by retail was already subject to a partial prohibition under sub-section 1, namely, as to quantities less than a quart ; by this sub-section (9) his selling by retail may be prohibited *altogether*. The partial prohibition to which he was before subject in his retail business, namely in quantities less than a quart, might now be made total. I think that is the sole force and effect of the words " *totally* " and " *altogether* ."

Sub-sections 1 and 9 are parts of the same section, and in sub-section 1 the sales intended to be dealt with are divided into two classes : the first class comprises sales in inns, alehouses, beerhouses, and any other houses or places of public entertainment ; the other class comprises sales in shops, stores or places other than inns, alehouses, beerhouses, or places of public entertainment. In both classes the sales referred to are expressly limited to sales by retail. When we come to sub-section 9, the same two



classes are dealt with, but in briefer and less expanded language. There is the inn or public-house, and there are the shops and places other than the public-house. Sub-section 1 provides for the licensing of these two classes of places respectively, and sub-section 9 provides for prohibition in the same places, classifying them in the same way. To my mind it is irresistible that the sales intended to be dealt with are the same throughout, namely sales by retail only, although the word is not repeated with reference to shops. This construction makes the enactment sensible and consistent, and relieves it from what would otherwise, I think, appear to be an absurd meaning.

Judgment.

MACLENNAN,  
J.A.

I think this construction is aided by section 247 of the Act of 1858 (or section 252 of the Act of 1866) which declares that no tavern or shop license shall be necessary for selling in the original packages in which it is received from the importer or manufacturer so long as they contain not less than five gallons or one dozen bottles. That section took the place of the exception in the Act of 1853 already referred to, and defined what was wholesale and what was retail, for the purposes of the Act. I do not, however, think that section was essential to the construction which I put upon section 249.

In *In re Slavin and Orillia*, 36 U. C. R. at pp. 176, 177, the late Chief Justice Richards, in delivering the judgment of the Court, expressed the opinion that the prohibiting power of this section was confined to sales by retail, and he pointed out that prior to Confederation the legislature of Canada limited the granting of licenses to persons who sold by retail, and did not require the manufacturer or importer to obtain a license to sell by wholesale; and that legislation as to excise or manufacture, and the licensing of those engaged in that business, was kept distinct from the legislation as to shop and tavern licenses.

The enactment in question then, in 1866 and 1869, and until it was repealed by 37 Vic. c. 32, sec. 61, was merely a power granted to municipalities to prohibit the retail

Judgment.  
MACLENNAN,  
J.A. traffic in liquors. It was not a power of *total* prohibition, but a comparatively small power confined to retail business, and was the same which was conferred first in the year 1853, and which was possessed by the municipalities unimpaired at the time of Confederation.

Coming to the conclusion that the enactment in question is confined in both its members to sales by retail, I think it follows clearly that it was competent to the legislature of Ontario to re-enact it as falling within the class of subjects, "Municipal Institutions in the Province," under subsection 8 of section 92 of the B. N. A. Act. It is unnecessary to repeat the argument which has been so fully and forcibly elaborated by other judges, beginning with the late lamented Chief Justice Richards in *In re Slavin and Orillia*, 36 U. C. R. 159, above referred to. At page 175, with reference to the very enactment in question, he says: "As far as the Province of Upper Canada was concerned, the delegates" (for procuring the B. N. A. Act) "who represented the views of that section of the United Province of Canada, well knew what the municipal institutions of Upper Canada were, and some one of them had probably introduced and carried through the Legislature, only a short time before, the Act passed on 15th August, 1866, entitled, 'An Act respecting the Municipal Institutions of Upper Canada,' 29-30 Vic. c. 51. They knew that in the sections of that Act already referred to the power was granted to the municipalities in Upper Canada, under certain circumstances, to limit the number of taverns and to prohibit the licenses of shops for the sale of spirituous liquors in the several municipalities. When, then, this Imperial Act uses the very words of the title of this bill in giving as one of the class of subjects on which the Provincial Legislature may pass laws, viz., 'Municipal institutions in the Province,' can there be any reasonable doubt that it was expected and intended that the 'municipal institutions' which were to be constituted under that authority, would possess the same powers as those which were then in existence, under the same name, in the Province. I should think not."

In *Sulte v. Three Rivers*, 11 S. C. R. 25, at pp. 40 *et seq.* Judgment.  
Mr. Justice Gwynne enters still more elaborately into the MACLENNAN,  
argument and at p. 43 says: "I cannot doubt that by item J.A.  
No. 8 of section 92, which vests in the provincial legislatures the exclusive power of making laws in relation to municipal institutions, the authors of the scheme of Confederation had in view municipal institutions as they had then already been organized in some of the provinces; and that the term as used in the B. N. A. Act, unless there be some provision to the contrary in section 91 of the Act, comprehends the powers with which municipal institutions, as constituted by Acts then in force in the respective provinces, were already invested for regulating the traffic in intoxicating liquors in shops, saloons, hotels and taverns, and the issue of licenses therefor, as being powers deemed necessary and proper for the beneficial working of a perfect system of local municipal self government."

In delivering the judgment of the Quebec Court of Appeal, in the case last mentioned, Mr. Justice Ramsay went further than is necessary for the decision of this case, and held that the right to pass a prohibitory liquor law for the purposes of municipal institutions had been reserved to the local legislatures by the B. N. A. Act; and in upholding that judgment in the Supreme Court, Mr. Justice Strong says he entirely agrees with the judgment delivered by Mr. Justice Ramsay. I am not sure however, that he means to express approval of that judgment to the full extent expressed by the learned Judge of the Court below, as the affirmance of the judgment did not absolutely require it.

It is not necessary for the purpose of answering the questions before us, to determine how far by reason of the existence, at the time of Confederation, of the Dunkin Act, the Provinces may, under sub-section 8 of section 92, have the power of absolute prohibition, and I desire to express no opinion on that point one way or the other. It is enough to say that I think it clear that under that section the province has the power to revive the enactment in

Judgment.  
MACLENNAN, J.A. question, and that our answer to the first two questions ought to be in the affirmative.

With regard to the third question, I am of opinion that as incidental to the power to prohibit the retail traffic in liquor the province must have the power, acting *bonâ fide*, to define from time to time what constitutes retail traffic. We have seen what the definition was in the Act of 1853. It was substantially the same under the Acts of 1858 and 1866. This has been changed, and is now regulated by the R. S. O. (1887), c. 194, sec. 2, sub-secs. 2, 3 and 4. In my opinion the municipalities named in the third question cannot at present prohibit under the revived enactment such sales as are described in sub-section 4.

In answer to the fourth question, I am of opinion that the want of a penalty does not invalidate such a by-law.

OSLER, J. A., declined to give any opinion.

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## MCCAFFREY V. MCCAFFREY.

*Undue influence—Voluntary conveyance—Confidential and fiduciary relationship—Husband and wife.*

A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Distinction between undue influence in cases of gifts inter vivos and testamentary gifts referred to.

Judgment of ROSE, J., reversed, HAGARTY, C. J. O., dissenting.

THIS was an appeal by the plaintiff from the judgment *Statement.* of ROSE, J., at the trial, dismissing the action.

The action was brought by the plaintiff, a person of unsound mind not so found, by his next friend, to set aside a conveyance made by him to his wife under the circumstances stated in the judgments, and was tried at Ottawa, on the 30th of April, 1890. The appeal came on to be heard before this Court [HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ. A.], on the 11th of March, 1891.

*McTavish*, Q. C., for the appellant.

*Hogg*, Q. C., for the respondent.

September 15th, 1891. MACLENNAN, J. A. :—

With great respect, I think this judgment ought not to be allowed to stand, but should be reversed, and that the conveyance impeached should be set aside.

It may be conceded that at the date of the deed, the plaintiff had sufficient legal capacity to make a valid deed ; and also that it was duly explained to him, and that he understood that it was a conveyance of the land in question to his wife ; yet I think that from the undisputed facts of the case, it must be declared invalid. I think the evidence shews that when the deed was made, the defendant's relation to her husband was confidential and fidu-

Judgment. *ciary* within the meaning of the decision in *Huguenin v. Baseley*, 2 W. & T. L. C., 6th ed., 597, and the numerous cases in which the principle of that case has been applied.

MACLENNAN,  
J.A.

The words of Sir Samuel Romilly, in the case referred to, have been adopted by the highest authority as correctly expressing the law, where he said that the "relief stands upon a general principle applying to all the variety of relations in which dominion may be exercised by one person over another;" and in *Dent v. Bennett*, 4 M. & Cr. at p. 276, Lord Cottenham said he would not narrow the rule or run the risk of in any degree fettering the exercise of the beneficial jurisdiction of the Court by any enumeration of the description of persons against whom it ought to be most freely exercised; and in *Hunter v. Atkins*, 3 M. & K. at p. 140, Lord Brougham said "that where the only relation between the parties is that of friendly habits, or habitual reliance on advice and assistance, accompanied with partial employment in doing some sort of business, care must be taken that no undue advantage shall be made of the influence thus acquired."

In *Tate v. Williamson*, L. R. 2 Ch. at p. 60, Lord Chelmsford used this language: "The jurisdiction exercised by Courts of Equity over the dealings of persons standing in certain fiduciary relations has always been regarded as one of a most salutary description. The principles applicable to the more familiar relations of this character have been long settled by many well known decisions, but the Courts have always been careful not to fetter this useful jurisdiction by defining the exact limits of its exercise. Wherever two persons stand in such a relation that, while it continues, confidence is necessarily reposed by one, and the influence which naturally grows out of that confidence is possessed by the other, and this confidence is abused, or the influence is exerted to obtain an advantage at the expense of the confiding party, the person so availing himself of his position will not be permitted to retain the advantage, although the transaction could not have been impeached if no such confidential relation had existed."

The latest case on the subject is *Allcard v. Skinner*, 36 Ch. D. 145, in which the principle on which the Court acts, underwent a very elaborate discussion by the Justices of Appeal. At p. 171, Cotton, L. J., says there are two classes of such cases: "First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose; second, where the relations between the donor and donee have, at or shortly before the execution of the gift, been such as to raise a presumption that the donee had influence over the donor. In such a case, the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor, acting under circumstances which enabled him to exercise an independent will, and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. The first class of cases may be considered as depending on the principle that no one shall be allowed to retain any benefit arising from his own fraud or wrongful act. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed by the donee, but on the ground of public policy, and to prevent the relations which existed between the parties and the influence arising therefrom being abused." At pp. 181 and 182 Lindley, L. J., discusses the principle and expresses the opinion that the doctrine of the Court is founded on this, that it is expedient and right to save persons from being victimized by other people, and not merely to save them from the consequences of their own folly. He then goes on to point out that the doctrine of the Court has grown out of the necessity of grappling with the infinite varieties of fraud; that gifts are set aside without proof of the actual exercise of influence, on the ground of the necessity of going this length in order to protect persons from the exercise of such influence under circumstances which render proof of it impossible. The Courts have required proof of its non-exercise, and failing that proof, have set aside gifts otherwise unimpeachable.

Judgment.

MACLENNAN,  
J.A.

Judgment. In my judgment the present case, in its facts, is within  
MACLENNAN, both of the classes of cases mentioned by Lord Justice  
J.A. Cotton. I think there is evidence here of influence expressly used by the donee to procure the gift; and I also think that the relations between the donor and donee at and before the execution of the gift, were such as to raise a presumption of influence by the donee over the donor.

I think there is no evidence but that of the defendant herself, that the plaintiff had intended or promised at any time before his illness to make the deed in question. Mr. Christie does, indeed, say that after his marriage with the defendant, the plaintiff had spoken to him several times about giving his property to his wife; but it turns out that this was no more than a jocular suggestion made by Mr. Christie to the plaintiff, soon after the marriage, that he supposed he would be giving this property to his pretty wife, to which he assented. The defendant herself says there was a promise before marriage, often repeated afterwards, that the property would be hers when the mortgage then standing upon it was paid. On the other hand, the mortgage was paid off on the 4th of October by the plaintiff himself to Mr. Christie at his office, by a cheque which turned out to be defective, and which was afterwards exchanged for money at the plaintiff's lodgings, in presence of both plaintiff and defendant, but there was nothing said on either occasion about any conveyance; and the instructions for its preparation were given about a fortnight afterwards, not by the plaintiff but by the defendant.

It is also apparent from the defendant's own evidence, that she was eager and urgent about it, and anxious until it was completed. They had been married for five years; there were no children. The mortgage was paid off on the 4th of October, and the costs of a discharge paid at the same time, and yet nothing was said about a conveyance, although this was the time according to the defendant's account of it, that she was to receive it. The plaintiff went to Montreal without giving any instructions, and it



is only after his return, and after his accident, that the instructions were given, and then not by the plaintiff but by the defendant. Her account of it is, that on the Sunday after the mortgage was paid off, the plaintiff told her he had given instructions for the deed; and that after they returned from Montreal, she went to Mr. Christie to ask him if the deed had been prepared yet, and he said "no, it is not quite ready." She repeats this in cross-examination, that the answer she received was, "that the deed was not ready yet;" but afterwards she says Mr. Christie's answer was that he did not remember receiving any instructions, but he would ask his brother.

Judgment.

MACLENNAN,  
J.A.

Mr. Christie's evidence, however, is that when she came to his office, she enquired if her husband had given instructions for the deed, and he said no, and that he would prepare a deed at once, for her husband had always intended to give it to her. Mr. Christie accordingly prepared the deed, and sent it to the plaintiff's lodgings, where it was received by the defendant, the plaintiff himself being in bed, owing to his accident. The defendant afterwards dressed him and took him up to Mr. Christie's office where the deed was signed. I think it is plain from all this, that but for the active intervention of the defendant, the deed would never have been signed. It was, in my judgment, made at her instance and request, and was not the pure voluntary act of her husband. There is a significant piece of evidence given by Susan Hagarty, the plaintiff's niece, with whose mother the plaintiff and defendant were at this time boarding. Miss Hagarty says she drove with the defendant to Mr. Christie's office, and remained in the carriage at the office door, while the defendant went in about the deed; and that when the latter came out, she said: "I found him out in another lie; he told me long ago that property was signed over to me, and I went and asked them and they said, no; he never told them to do it;" that she further said: "I told them to make out the deeds in my name, and he would come up and sign them." The defendant will not venture to deny this conversation,

Judgment. or its accuracy, except that she says her reference to her husband lying to her did not refer to the deed, but to his drinking; that he used to tell her he did not drink, and she thought it was a lie, another lie. Whatever view may be taken of these conflicting pieces of evidence, it all goes to shew that the plaintiff did no single act towards the preparation of the deed, until he came to the office and signed it, while it is clear that it was the defendant who put everything in motion which led to its preparation and final execution; and I think, therefore, that it is apparent that but for her activity in the matter, the deed would never have been made.

MACLENNAN,  
J.A.

The next point to consider is the relation in which the parties stood at the time of the making of the deed. There can be no doubt that at that time the plaintiff's physical and mental condition were greatly impaired. For some time before, he was unable to transact business with safety or prudence. In September, when he went to pay his taxes, he was unable to draw up a cheque, or to sign his name properly; and he had so far lost ordinary business caution and prudence that when the defective character of the cheque he had given was pointed out to him by the tax collector, he told the latter to make out a new one and to sign it himself, and then went hurriedly away. Shortly afterwards he engaged in the business of buying and selling potatoes, and it is evident that he was utterly unfit to do such business. About the same time it was also that the mortgage was paid off, and in this instance also the cheque he gave was defective, and useless. That was on the 4th of October, and on the 8th he went to Montreal to make sale of his potatoes; and then on the 10th he met with an accident, having his right arm broken by collision with a passing railway train. Before this accident, however, he had gone to a jeweller in Montreal and there purchased two diamond rings; one for \$120 and one for \$200, for which he gave cheques in payment, but for which he had no money in the bank. It is not disputed but that this purchase of diamonds was an utterly foolish transaction,

and one he would never have entered into but for the decay of his faculties; and when the defendant came to Montreal in consequence of his accident, she induced the jeweller to take the diamonds back. This was the plaintiff's mental condition prior to the 21st of October, the date of the deed, and his disease was paresis, a physical and mental ailment, which, according to the evidence, is incurable, and which always gets worse, but never better. He was in the hospital in Montreal from the 10th of October to the 15th, his wife being in attendance upon him, and on the 15th they returned together to Ottawa.

The deed was signed on the 21st. His ailment continued to grow worse until January, when he was sent to the hospital at Ottawa, and on the 20th of that month he was removed to the Provincial Asylum at Toronto as an incurable lunatic. Now such having been the condition of the plaintiff from the month of September, a condition, both mental and physical, requiring care, assistance and advice, both in his person and in his business affairs, the evidence shews that the person who alone offered him that care, assistance and advice was the defendant. She was with him constantly, walked with him, drove with him. She it was who afterwards paid the taxes for which he had given the defective cheque. It was from her and not him that Mr. Raper says he received the money for the defective cheque the plaintiff had given for the last instalment of the mortgage; that it was she who counted the money over. When the accident occurred she went to Montreal and took care of him at the hospital, and procured the diamond transaction to be undone, and then brought him home, and she was the only person in personal attendance upon him there. I think all this shows incontestably that the defendant was in a position of confidence and influence towards the plaintiff within the meaning of the decisions. But that is not all. She says he always consulted her about his business from the very first, about everything he did; that he always did just as she wished; and it is not immaterial that at the date of the deed she was about

Judgment.

MACLENNAN,  
J.A.

Judgment. twenty-six years of age, and before her marriage had been  
MACLENNAN a railway ticket agent for about a year.  
J.A.

If it be true, as she says, that the plaintiff always consulted her from the very first about his business, and about everything he did, and if he always did as she wished, if that was the state of things between them while he was in vigorous health, how much more must that have been the case when both his body and his mind had become enfeebled not only by the terrible malady from which he was suffering, but also by the painful accident which he had met with. I think it is not too much to say that when this deed was made she could have got him to do anything she pleased.

Such being the circumstances of the case and the relations of the parties, I think it was incumbent on the defendant and her solicitor to see that before making such a conveyance the plaintiff had competent and independent advice.

In *Rhodes v. Bate*, L. R. 1 Ch. 252, a case recognized as authority by Lord Selborne in *Mitchell v. Homfray*, 8 Q. B. D. 587, and by Cotton, L. J., in *Allcard v. Skinner*, 36 Ch. D. 145, already cited, Lord Justice Turner said (at p. 257): "I take it to be a well established principle of this Court, that persons standing in a confidential relation towards others cannot entitle themselves to hold benefits which those others may have conferred upon them, unless they can shew to the satisfaction of the Court that the persons by whom the benefits have been conferred had competent and independent advice in conferring them. This, in my opinion, is a settled general principle of the Court, and I do not think that either the age or capacity of the person conferring the benefit, or the nature of the benefit conferred, affects this principle." Here the plaintiff had no such advice, Mr. Christie was not his solicitor, and he does not pretend that he gave him any advice. His solicitor, whom he had been in the habit of employing was Mr. O'Connor, and this was known to Mr. Christie, yet the plaintiff was allowed to make this deed



without any suggestions of the prudence and propriety of his first consulting that gentleman in a matter of such importance. The plaintiff's whole property consisted of the land in question, worth \$8,000, on which there were three dwelling-houses, the rent of which was altogether \$900 a year, and another property called the Somerset property worth \$4,000 or \$5,000, mortgaged for \$1,500, the rent of which above the interest on the mortgage was \$195 a year.

Judgment.  
MACLENNAN,  
J.A.

If he had consulted Mr. O'Connor he would have explained to him the effect and consequences of what was proposed to be done, and would, I have no doubt, earnestly and firmly have advised him against it. He would have pointed out to him that if his wife died intestate the half of the property would at once go to strangers, and that if she chose to do so, she could will it away from him altogether, which would leave him with nothing but the rent of the Somerset property for his support; and if he still desired to give her the property he would have suggested his reserving to himself a life estate, and conveying it to her in remainder only. We cannot tell what the effect of such advice would have been. It might have been adopted and acted upon, or it might not. The plaintiff could have rejected it if he chose, but if he had, it would then have been clear that the deed was his own deliberate act, unaffected by any undue influence, and it would have been valid and binding.

For these reasons I think the conveyance should be declared invalid, and should be set aside, but I think there should be no costs either in this Court or in the Court below.

See also *Huguenin v. Baseley*, 2 W. & T. L. C., 6th ed., at p. 633; *May on Fraudulent Conveyances*, 2nd ed. p. 480; *Kerr on Fraud*, 2nd ed., p. 125, *et seq.*; 1 *Bigelow on Fraud*, pp. 262, 353; 2 *Pomeroy's Equity Jurisprudence*, pp. 471, 477, *et seq.*

Judgment. BURTON, J. A. :—

BURTON,  
J.A.

If we were reversing the learned Judge upon a question of fact, I should hesitate before placing my opinion in opposition to his, upon the well established principle adopted in all appellate tribunals; but upon the facts in evidence, taking the most favourable view for the respondent, I am unable to bring myself to the conclusion that she has satisfied the onus that was upon her of satisfying the Court that the plaintiff had competent and independent advice at the time of the execution of the impeached instrument, having regard to the position in which she stood; and looking at all the circumstances of the case, and the value of the property transferred in relation to his means.

That he was, even before his insanity had developed, much under the influence of his wife, is established by her own testimony; and, although it may be quite true that he had the intention of giving this property to his wife, that is a very different thing from the improvident act by which he deprived himself of his principal means of subsistence, and placed the property in such a position that in the event of her death, that upon which he mainly relied for his livelihood, would pass into the hands of strangers. Had it been a devise of the property, or a deed with a power of revocation, or a conveyance of the remainder, reserving a life estate, the transaction would not only have been free from objection, but so far as one can judge, a natural and proper exercise of discretion; but in the absence of such independent advice, how can it be said that the donor properly understood the effect of what he was doing?

The fiduciary, or quasi-fiduciary relationship being once established, the whole case may be comprised in a very brief extract from Lord Eldon's judgment in the leading case of *Huguenin v. Baseley*, 2 W. & T. L. C., 6th ed., at p.619, substituting the word "he" for "she" in the judgment.

"Take it," he said, "that she intended to give it to him,

it is by no means out of the reach of the principle. The question is not whether she knew what she was doing, had done, or proposed to do, but how the intention was produced; whether all that care and providence was placed round her, as against those who advised her, which, from their situation, and relation with respect to her, they were bound to exert on her behalf.”

Judgment.  
BURTON,  
J.A.

Here the plaintiff executed the deed prepared not by his own solicitor, but by a solicitor acting for the wife, who gave no sufficient explanation to him of the effect of such an instrument. The question is not only was the deed executed voluntarily, but with that knowledge of its effect, nature and consequence, which it was the duty of the solicitor, if he professed to act for the plaintiff, and *a fortiori* if he was acting only for the wife, to communicate fully to him before he was allowed to execute it.

I entirely agree with the remark of the late Master of the Rolls, that it is not the province of a Court of Justice to decide on what terms and conditions a man of competent understanding may choose to dispose of his property. If he thoroughly understands what he is about it is not the duty of a Court of Justice to set aside a settlement which he chooses to execute on the ground that he has omitted to insert provisions in his own favour, and for his own protection, which a prudent man would have done. The evidence here is abundantly sufficient to show that he was not competent to understand a matter of this kind, and the omission of any power of revocation, or the reservation of any interest during his own life, confirm the view that he did not understand it.

I attach no blame to the wife, she may have well understood that she was merely carrying out her husband's wishes, and it is most unfortunate that he had not been advised to seek the judgment and assistance of his usual adviser, and that such a clause had not been inserted in the deed as would have protected him.

I come to the conclusion I do with regret, but upon the principle of general public policy I think this deed cannot

Judgment. be allowed to stand, but I do not think that we should  
OSLER, give costs.  
J. A.

OSLER, J. A. :—

With great respect for my brother ROSE, I am obliged to hold that this deed cannot be supported. The evidence, in my opinion, falls far short of sustaining the onus which the law casts upon a donee or grantee in cases of this description.

When the mental and physical condition of the grantor and the position occupied towards him by the defendant at the time of the execution of the deed are considered, it is manifest that there was the existence of that species of influence which, in the absence of proof that the grantor had independent advice, the law regards as undue, and as destructive of a gift *inter vivos*, if it is afterwards impeached in the hands of the donee.

The rule, as deduced from the leading authorities, is well stated by Lord Penzance, in the case of *Parfitt v. Lawless*, L. R. 2 P. & D. 462, at p. 468: "In equity, persons standing in certain relations to one another—such as parent and child, man and wife, doctor and patient, attorney and client, confessor and penitent, guardian and ward—are subject to certain presumptions, when transactions between them are brought in question; and if a gift or contract made in favour of him who holds the position of influence is impeached by him who is subject to that influence, the Courts of Equity cast upon the former the burden of proving that the transaction was fairly conducted as if between strangers; that the weaker was not unduly impressed by the natural influence of the stronger, or the inexperienced overreached by him of more mature intelligence." The learned Judge in the same case points out the difference between the influence which is considered undue in the case of gifts *inter vivos*, and that which is necessary to be proved in attacking a testamentary gift. "The influence which is undue in the case of gifts *inter*



*vivos* is very different from that which is required to set aside a will. In the case of gifts or other transactions *inter vivos*, it is considered by Courts of Equity that the natural influence which such relations as those in question involve, exerted by those who possess it to obtain a benefit for themselves, is an undue influence. Gifts or contracts therefore brought about by those who possess it are set aside, unless the party benefited by it can shew affirmatively that the other party to the transaction was placed in such a position as would enable him to form an absolutely free and unfettered judgment."

Judgment.

OSLER,  
J. A.

See also *Wingrove v. Wingrove*, 11 P. D. 81, which was the case of a will.

And the principle is stated by Lord Justice Cotton, in the recent case of *Allcard v. Skinner*, 36 Ch. D. 145, at p. 171: "The question is, does the case fall within the principles laid down by the Court of Chancery in setting aside voluntary gifts executed by parties who, at the time, were under such influence as, in the opinion of the Court, enabled the donor afterwards to set the gift aside? These decisions may be divided into two classes. First, where the Court has been satisfied that the gift was the result of influence expressly used by the donee for the purpose: second, where the relations between the donor and donee have, at, or shortly before, the execution of the gift, been such as to raise a presumption that the donee had influence over the donor. In such a case the Court sets aside the voluntary gift, unless it is proved that in fact the gift was the spontaneous act of the donor acting under circumstances which enabled him to exercise an independent will, and which justifies the Court in holding that the gift was the result of a free exercise of the donor's will. In the second class of cases the Court interferes, not on the ground that any wrongful act has in fact been committed, but on the ground of public policy, and to prevent the relations which existed between the parties, and the influence arising therefrom, being abused." See also, per Kekewich, J., at p. 168; *Huguenin v. Baseley*, Wh. & T. L. C., Am. ed., 1156, 1174,

Judgment.  
OSLER,  
J.A.

1192; *Mitchell v. Homfray*, 8 Q. B. D. 587; *Irwin v. Young*, 28 Gr. 511.

Applying these principles to the case in hand, which is one of those falling within the second class referred to by Cotton, L. J., it appears to have been satisfactorily proved, that, for some time previous to the execution of the deed in question, the mental condition of the grantor had been gradually deteriorating, indicated externally by unusual drowsiness, uncertainty in his walk, general change in his bodily appearance, difficulty in expressing himself, etc., etc. The evidence of Mr. Kirby, the city treasurer, as to this is most significant, as also, considering the plaintiff's former business capacity and habits, is the evidence of the same witness and of Thompson, the tax-collector, in reference to the cheque given by the plaintiff in payment of his taxes, in the month of September previous to the execution of the deed. The sum for which it was intended to be drawn, was inserted in the wrong place, the blank where it should have been, was not filled up, and the name, instead of "Wm. McCaffrey," as the plaintiff was in the habit of signing it, in a fairly good hand, was written "Capt McCoffy" in a straggling, uncertain manner.

The collector says, that when he noticed the error and asked the plaintiff to correct it, the plaintiff told him to make it out properly or make a new one, and, upon being told "that it was necessary that he should sign his name to it, he replied, 'You sign my name for me,' or words to that effect, and went right off."

The taxes were afterwards paid by the defendant herself, who brought the money to the treasurer's office for the purpose.

We see too that Dr. Wright testifies that, although the plaintiff may have been, as he expresses it, competent during the month of October to do a sane act, such as to execute a deed, and could answer questions rationally, yet that the existence of mental disease of some kind had suggested itself to the witness before the plaintiff had gone to Montreal.

The potato speculation, which occasioned the visit to Montreal, from the manner in which it was commenced and carried out, and the foolish purchase of diamonds while there, are strongly suggestive of the development of that peculiar form of insanity for which the plaintiff was so soon afterwards confined in the asylum.

Judgment.  
OSLER,  
J.A.

It is abundantly proved that the plaintiff was very much under the control and influence of the defendant,—a shrewd, active, clear-headed woman. It was most natural, under the circumstances, that he should be so; and besides her own admission, several things have been pointed out as establishing the fact. I need not repeat them.

Great stress has been laid on the fact that the plaintiff had on several occasions spoken of his intention to convey the property in question to his wife, when he had paid off the mortgage; and it has been strongly urged that what he ultimately did, is to be regarded simply as the execution of a well defined and settled determination which he had arrived at, when there could have been less doubt of his ability to think and act for himself.

I cannot attach to this circumstance the weight which was given to it at the trial.

It is noticeable that the plaintiff took no independent step to carry his intention into effect. Nothing was said about it when he paid off the mortgage. It was the defendant who urged the matter, and who instructed the solicitor to prepare the deed, and who brought the plaintiff to the office where it was executed. No doubt it was read over to him, as the solicitor says, and he probably quite understood that he was signing just such an instrument as it purported to be. But this was, under the circumstances, clearly not sufficient. It was most important that the effect of what he was doing should have been made clear to the plaintiff's apprehension; and, if he had consulted with an independent solicitor, it is not unreasonable to suppose he would have been advised as to the proper method by which he could have substantially settled the property upon the defendant, without denuding himself of

Judgment.

OSLER,  
J. A.

all interest in it; and it would, at all events, have been made plain to him that, having regard to his age, the position and value of the rest of his property, and his probable means of livelihood, he would, in simply conveying the property to the defendant absolutely, be doing a most foolish and improvident act. It by no means follows that, because he had in the past expressed a general intention to convey the property to the defendant, he would have carried out such intention in an improvident manner, or in the particular way in which the defendant instructed it to be done.

For these reasons the deed in question must, I consider, inevitably be regarded as a voidable deed; and nothing has occurred to preclude the plaintiff from invoking the aid of Court in setting it aside. I impute, under all the circumstances, nothing morally wrong either to the defendant or her solicitor; and I think there should be no costs of the action or of the appeal.

HAGARTY, C. J. O.:—

The nominal plaintiff is now confined in the lunatic asylum, and has so been since the 20th of January, 1890, and sues by his next friend to have a deed executed by him on the 21st of October, 1889, conveying some valuable property in Ottawa to the defendant, his wife, declared void, as having been obtained from him by undue influence by the defendant at a time when he was of unsound mind.

He was married to the defendant in January, 1885, she being his second wife. He had no family by her, and his only child by his first marriage had died. His brother sues as his next friend.

He and the defendant appear to have lived harmoniously together.

The defendant denies all undue influence, and insists that he was quite competent to convey.

The property is in Ottawa, and is said to be worth \$8,000. It was subject to a mortgage, which he was pay-



ing off in instalments. She swore that before their marriage he said that this property should be hers when the mortgage was paid off, and a few days after the marriage he drove her to see the property, and again said as before. She said he used to consult her about everything, and generally yielded to her opinion.

About the 7th or 8th of October, he went down on some business to Montreal, and had his arm hurt in some railway accident. She went down and brought him home, and he was a few days in the hospital at Ottawa. He had his arm in a sling and could not use it.

Early in October, or late in September, prior to the accident, he came to Mr. Christie's office, who held the mortgage, and gave a cheque for the remaining payment. The cheque was wrong, and the bank would not pay, so Roper, Christie's clerk, went to him to get another cheque and \$200 in cash, which paid all off, and the mortgage was discharged.

Mr. Christie's evidence is important. He had known the plaintiff for years, and the latter often came to his office making payments on the mortgage.

Shortly after the marriage, Christie said to him, as he had married a very pretty wife, he ought to make some provision for her as he had no children. He replied that he was going to give her the property that he (Christie) had the mortgage on. This he often said to him.

Two or three days before the deed was executed, the defendant came and asked Christie if her husband had instructed him to prepare a deed to her of this property. He said no; and added that he would prepare it at once, as the plaintiff had always intended to give her the property.

The deed was prepared. Roper, the clerk, took the deed to the house and gave it to the defendant; and on the 21st of October, she came with her husband to Christie's office. Christie says he fully explained the transaction. The plaintiff's arm was disabled, and he made his mark, Christie and Roper witnessing it.

Judgment.

HAGARTY,  
C.J.O.

Judgment.

HAGARTY,  
C.J.O.

They both say that the plaintiff fully understood what he was doing and appeared perfectly rational; said he came to execute the deed. After signing, he said he wanted to pay for it, and told his wife to put her hand in his pocket and she took out some money and paid the bill.

Christie says: "He appeared to me to be a man who understood what he was doing. He spoke to me as doing something he said he would do before, that is giving the two lots to his wife. He appeared to be capable of doing any kind of business, and I would have bought property from him or sold property to him on that occasion, or entered into any contract with him."

Roper's evidence is equally clear, and he adds that the plaintiff then gave them a very lucid account of the accident that occurred in Montreal.

Christie and Roper had known him for many years.

Dr. Wright had known him some time, and was his regular attendant. (The charge was that from April of that year he was wrong in his head.) The doctor says that in the summer and fall he seemed depressed. Until after October he had not made up his mind as to what was the matter, and—assuming that he returned from Montreal about the middle of October—he is certain that for several weeks he answered his questions rationally, and he considered he was capable of doing a sane act. But the doctor says that before he went to Montreal, some mental disease of some kind was in progress; that it was three or four weeks after the accident he became satisfied of his disease, "paralysis of the brain," which commenced, he thought, early in the fall. He says he is sure he was competent during October to do a sane act.

Doctor Clark received the plaintiff in the asylum on the 20th of January. His disease was "progressive paresis," formerly called "progressive insanity." He says he does not know of a case when paresis began, and when the sound state ended.

"Q. How does it affect the person physically? A. Well, in the beginnings of it you see the effects of it in his walk, in

a general shuffling, of his unhandiness to handle his legs; you will see it also often in the power of the man to grasp things, his prehensile powers; the same way with his feet, not under control; you have the thickening of the articulation as if the tongue were too large for the mouth, a tremulousness of the lips, in fact evidence of general physical deterioration. The reason why it is not called paralysis—it is not a paralysis because the sensation remains, and power of motion remains to a greater or less extent; it is not really paralysis, it is a misnomer to call it such, but a depression of the muscular system.

Judgment.

HAGARTY,  
C.J.O.

Q. You have described how it commences? A. Then he becomes usually egotistic; he imagines he can go into great schemes, usually imagines that he can do almost any thing in the shape of mental work, plans and projects of all kinds; in fact he acts, as very well said to-night, as if he were under the influence of liquor, if you did not know something else was operating upon him. That is the initiatory stage which goes on from bad to worse until finally death ensues."

He adds, "from the evidence I have heard, I could not draw any conclusion as to his capacity in October—the evidence is conflicting."

The doctor is very properly cautious in giving any decided opinion as to October. He says, "My belief is that a man can be insane and do a rational act. \* \* The question with me is, there is no doubt of the man being insane in October; the question is, whether he did a rational act that would hold in law." He considers the man was insane in October, but many an insane man does a rational act.

On Doctor Wright's evidence he remarks: "I would say he was capable of knowing what he was doing in October as far as signing a deed is concerned. I may say, of course, to elucidate this matter, a great many of the insane in their lucid intervals are quite capable of doing rational business; \* \* no two men are alike; in one man the disease makes more progress in two years than in another man in four."

Judgment.

HAGARTY,  
C.J.O.

There was some evidence offered as to the strong influence exercised over the plaintiff by his wife. It was alleged that she would order him about and he would obey her always.

His niece, the most hostile witness probably, spoke of her shewing him a strap when he hesitated in obeying her; but there was no evidence that it was ever used. She says that he was very quiet in October, and it was not till late in November or December that he became violent, and the strap was first shewn rolled up.

It was in consequence of his becoming violent that he was ultimately placed in the asylum.

It was after his return from Montreal that the witness first noticed the wife's increased influence over him.

I need not notice some evidence as to some acts, such as signing his name wrongly to a cheque, and apparently improvident bargaining about potatoes, and potato bags.

On the whole, the evidence impeaching the deed is, I think, not safely to be relied on against the strong testimony on the other side.

I am unable to say, after very full examination of the evidence, that the learned trial Judge has not arrived at the safest conclusion. He says:

"Upon reflection, I feel clear that the proper inferences of fact from the evidence are that the plaintiff, prior and subsequent to his marriage, had the intention to convey the property in question to the defendant, his present wife; that such intention continued to the time when he executed the deed; that the conveyance was an act of his volition to carry into effect the intention previously formed, and was in the exercise of judgment; that although then afflicted with disease, progressive paresis, and subject to certain delusions, the disease had not so far progressed as to affect or influence his action with reference to this property."

Mr. Christie certainly had the best means of testifying as to the plaintiff's capacity to do the act complained of, from his long acquaintance and full knowledge of his



expressed intention to give this property to his wife long before he had ceased to be in perfect health of mind and body. He had dealings with him for years, connected with the mortgage; and although not apparently his regular legal adviser, it was very natural that he should come to him to make the conveyance after he had made the final payment.

Judgment.  
HAGARTY,  
C.J.O.

It would have been perhaps a much more prudent course for the plaintiff to have reserved his life interest in this property in conveying to his wife.

As to the alleged influence :—The wife frankly admits that she had such influence to the extent of his always consulting her, and almost always following her advice. But coupled with the proved intention expressed for years of conveying the property to her, postponed until it was finally freed from the mortgage, I hardly see how we can properly interfere with the conclusion and finding of the trial Judge.

We have to consider the position of the childless man—not apparently specially attached to any of his blood relations—carefully watched over and attended (as the evidence shews) by his wife, carrying out an old promise and intention of giving her this property.

This was not his only property, although much the most valuable.

It is hardly necessary to go through the many authorities bearing on this question. The whole issue may be included in the fifth reason of appeal: "That the Judge was wrong in finding that the appellant possessed sufficient capacity to execute the said alleged deed, and that he sufficiently understood the same."

This is a question of fact. Conceding in the plaintiff's favour that it was necessary for a wife under the circumstances to prove capacity and volition in the husband to make this voluntary deed to one standing in such a position as she occupies, I cannot say that she has not answered this requirement of the law.

Judgment.

HAGARTY,  
C.J.O.

I do not think that this is a case to which we should apply any hard and fast rule to the effect that where a fiduciary relation is established the voluntary conveyance must be set aside unless the grantor is shown to have had independent legal advice, etc.

What we have here in the evidence is that a man marrying promised to settle a property on the wife; that soon after the marriage he is proved by independent testimony to have expressed his intention of conveying it to her.

Mr. Christie states that he repeated this to him on several subsequent occasions. He was very severely cross-examined on this, but although he declared that he could not specify each occasion, or give his actual words, I do not think he was shaken in his assertion as to several occasions.

The plaintiff used to visit him generally half yearly to pay interest on the mortgage on this property in Mr. Christie's hands. The whole tenor of the evidence as to these expressions of intention does not lead me to any doubt of the general truthfulness of the solicitor's statement. I do not think the trial Judge doubted its substantial accuracy. He says: "I accept Mr. Christie's evidence, and it seems to me inconsistent with his evidence to find either undue influence or want of contracting or disposing power or capacity."

Unless we refuse to credit this evidence from a solicitor who for twenty years was well acquainted with the plaintiff and his affairs, and had business dealings with him, who declares so explicitly the circumstances under which the deed was executed—supported as to this by the evidence of the clerk Roper—I do not see how we can properly reverse the trial Judge. There is no direct evidence contradicting this testimony.

It is doubtless shewn that his wife was the stronger and more active mind of the two, and that she had much influence over him, and some singular foolish acts of the plaintiff are narrated. I cannot hold that the trial Judge violated any known rule of law in deciding as he did in favour of this conveyance, which we may consider as a post-

nuptial settlement executed in accordance with previously expressed promise and intention.

Judgment.

HAGARTY,  
C.J.O.

I do not wish in any way to disregard the very proper rules laid down in such cases as *Rhodes v. Bate*, L. R. 1 Ch. 252.

I do not consider that the facts before us warrant our applying them to the allowing of this appeal.

I treat the case as one of fact. There was evidence to warrant the finding, and I am not prepared to say that as a juror I might not have found as the learned trial Judge found.

*Appeal allowed without costs, HAGARTY, C.J.O.,  
dissenting.*

## ATTORNEY-GENERAL OF CANADA V. CITY OF TORONTO.

*Municipal corporations—Water rates not a tax on land—Power of city of Toronto to fix water rates—Discount allowed to taxpayers but not allowed to public buildings—35 Vict. ch. 79 (O.), as amended by 41 Vict. ch. 40, (O.).*

By statute 35 Vict. ch. 79 (O.), as amended by 41 Vict. ch. 41 (O.), the corporation of the city of Toronto was empowered in regard to the city water works, to fix the price, rate, or rent which any owner or occupant of any house, lot, etc., in, through, or past, which the water pipes should run, should pay as water rate or rent, whether the owner or occupant should use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant, or conferred upon him or his property by the water works. The corporation was also empowered to fix the rate to be paid for the use of the water by public buildings. Pursuant to these powers, a by-law of the corporation was passed providing that the half-yearly rates "paid within the first two months of the half-year for which they are due, shall be subject to a reduction of fifty per cent. save and except in the case of government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply :"—

*Held*, that "government institutions" in the by-law meant government buildings in which some public business is carried on, and were "public buildings" within the meaning of the Act :—

*Held*, also, that the "price, rate, or rent," paid for the water, was not a tax but merely the price paid for the water supplied to the consumer, and that the corporation were not obliged to allow, for water supplied to public buildings, the discount allowed to taxpayers.

**Statement.**

THIS was an appeal by the plaintiff from the judgment of Ferguson, J., reported 20 O. R. 19, dismissing the action with costs, the facts being as follows: By the statute 35 Vict. ch. 79 (O.), Water Works Commissioners were appointed for the city of Toronto, who were authorized, amongst other things, to regulate the distribution and use of the water in all places and for all purposes where required, and to fix the prices for the use thereof; and also to fix "the price, rate or rent, which any owner or occupant of any house, tenement, lot, or part of a lot or both, in, through, or past which the water pipes shall run, shall pay as water rate or rent, whether such owner or occupant shall use the water or not, having due regard to the assessment and to any special benefit and advantage derived by such owner or occupant, or conferred upon him or her or their property by the water works and



the locality in which the same is situated." There is also Statement.  
a provision in the Act constituting the water rates a lien upon the properties benefited. Additional power was given to the commissioners to fix the rate or rent to be paid for the use of water by *public buildings*.

By the statute 41 Vict. ch. 41 (O.), the powers of the Water Works Commissioners were vested in the corporation of the city of Toronto.

By-law 1998 of the city of Toronto, to amend a former by-law, was passed in the words following: "All such half-yearly rates paid within the first two months of the half-year for which they are due, shall be subject to a reduction of fifty per cent. save and except in the cases of *government or other institutions* which are exempt from city taxes, in which case the said provisions as to discount shall not apply."

A tender was made from time to time on behalf of the Dominion Government of the amount charged for water in respect of certain government buildings, less fifty per cent. discount, but on each occasion the tender was refused by the Water Works Department on the ground that the Dominion Government were not entitled to discount in respect of these buildings under the by-law in question. Eventually payment was made under protest of all arrears charged in respect of these buildings, and this action was brought claiming the amount of rebate, on the grounds that the buildings in question did not come within the meaning of the words "exempt from city taxes" in the by-law, and that even that if they were within the meaning of these words, the by-law was, in so far as it affected the Crown, *ultra vires*, and so far as it sought to exclude the Crown from the right to the rebate, invalid.

The case was presented on motion for judgment on the pleadings.

*James Reeve, Q.C., and Wickham, for the appellants.*

*Biggar, Q.C., for the respondents.*

Judgment. November 10th, 1891. OSLER, J.A.:—

OSLER,  
J.A.

The question is whether the Crown is entitled to have the public buildings belonging thereto mentioned in the statement of claim supplied by the defendants with water on the same terms as occupants of other buildings in respect of which taxes are paid, that is to say subject to a reduction or discount upon the ordinary rate, rent, or price.

[The learned Judge here stated the facts as above set out, and continued.]

The provisions of the general Act, R. S. O. ch. 192, sec. 19, "An Act to provide for the Construction of Municipal Water Works," are substantially similar to those of the 35 Vict. ch. 79, authorizing the corporation to fix the prices for the use of the water, and to "fix on the rate or rent to be paid for the use of the water by hydrants, fireplugs and public buildings."

Section 480, sub-sec. 3 of the Municipal Act R. S. O. ch. 184, enacts that where any municipal corporation has constructed water works, and there is a sufficient supply of water it shall be the duty of the corporation upon request to supply water to all buildings within the municipality lying along the line of any supply pipe, etc.

It was very faintly urged on the argument that the buildings mentioned in the statement of claim, customs-house and warehouse, postoffice, etc., were not public buildings within the meaning of section 12, 35 Vict. ch. 79, or were not sufficiently described or specified as such in the by-law by the words "government or other institutions exempt from city taxes." A little care in framing the by-law would have prevented such a question as this from arising; but upon full consideration I see no good reason for differing from the view taken by my brother Ferguson on this point, and holding that "government institutions" may fairly be taken to mean government buildings, buildings belonging to the government in which some business of or relating to the government—public business—is carried on; and hence "public buildings," within the

meaning of the Act. The word "institution" is not used in its abstract sense, but as signifying a place or premises, which, if not exempt for some reason or other, would be taxable.

Judgment.

OSLER,  
J.A.

I also agree with the learned Judge below, that the "price, rate, or rent," paid for the water is not a tax or in the nature of a tax, at all events, where it is actually supplied to a consumer, and not attempted to be charged upon property under section 12 of the 35 Vict. ch. 79, whether used or not. Under the by-laws in question, the water is sold, and what is paid by or charged to the consumer is the price.

If it were a tax, the argument, to be valid, should go the length of proving that the city was bound to supply water without charge in the case of buildings occupied by Her Majesty, or by her servants for her, and not merely that it was to be supplied on the same terms as to discount as those given to ordinary consumers. But this was not contended for. What Mr. Reeve urged was that, because exemption from taxation was made the reason or ground for not giving the discount in the case of public buildings, it was thus attempted indirectly to impose taxation upon the Crown to the extent of the discount.

The same argument would apply to shew the by-law invalid in the case of buildings or premises exempt from taxation by statute, as well as of those exempt by reason of the prerogative. But if the charge is not itself a tax, and if the city has the right to fix a rate or rent to be paid for the use of water by public buildings, the argument falls to the ground; for why should not the very fact of exemption from taxation, whether by prerogative right or by statute, be made the foundation for demanding a higher price for the commodity which the city has to sell, when those exempt from taxation wish to buy; and, if the right exists, can it matter what reason is given for its exercise?

I do not think that the by-law is objectionable on the ground that in terms no distinct special rate is fixed in the case of public buildings. Substantially, that is done by

**Judgment.**

**OSLER,  
J.A.**

the proviso that the clause as to the discount shall not be applicable to them.

I think that the appeal should be dismissed.

HAGARTY, C. J. O., BURTON and MACLENNAN, J.J.A., concurred.

*Appeal dismissed with costs.*

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ONTARIO NATURAL GAS COMPANY V. GOSFIELD.

*Minerals—Natural gas—Right to bore on highway.*

Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. ch. 184, sec. 565, which gives power to the corporation of any county or township to sell or lease mineral rights under highways.

**Statement.**

THIS was an appeal from the judgment of STREET, J., reported 19 O. R. 591, dismissing the appellant's application to quash a by-law of the respondents authorizing the leasing of a portion of the highway in the township to certain parties for the purpose of drilling thereon a well for natural gas.

C. Robinson, Q. C., and H. S. Osler, for the appellants. The municipality had no power to pass the by-law in question because natural gas is not a mineral within the meaning of sec. 565 of the Municipal Act, R. S. O. (1887), ch. 184. It is an error to say that any general definition of "minerals" has been laid down. All definitions turn on special circumstances. The word may include everything in the ground; but there must be clearly some limitation here. A prehistoric boat is not a mineral: *Elwes v. Brigg Gas Co.*, 33 Ch. D. 562. The respondents say that coal oil is a mineral. The latest case, however, is to the contrary: *Dunham v. Kirkpatrick*, 101 Pa. St. 36. Brine is not a mineral: *In re Dudley Settled Estates*, 26 Solrs. Jour. 359. Brine and coal oil are like gas, inas-



much as they are in motion, not stationary. The <sup>Argument.</sup> interpretation of the word should be the ordinary and reasonable meaning which the mass of mankind would have given at the time it was used: Maxwell, 2nd ed., 69. Clearly under such meaning natural gas would not be included in the word "mineral." The primary meaning would appear to be a metallic substance that may be obtained by mining operations: See Webster's Unabridged Dictionary. Air is just as much a mineral as natural gas, but this is a *reductio ad absurdum*. Volcanic smoke, water from hot spring, etc., are minerals in one sense, but never according to ordinary usage. The object of the Act is to prevent mining operations from being interrupted when a lead is crossing under a highway, and to prevent the great expense of making another shaft across the highway. It was never intended to give general power to prospect under a highway. No doubt, as a matter of law, any individual may bore on his own land, and thus injure us; but the possibility of this hardship is a strong argument against the statute being intended to have this construction. At the time the Act was passed, natural gas was unknown. The legislature is to be presumed to be dealing with what was known at the time the Act was passed. New meanings and improvements cannot be read in: *Bridge Prop's v. Hoboken Co.*, 1 Wall. 116. [HAGARTY, C. J. O.—"Suppose a new mineral is found, would there not then be power to give a right to bore?"] There would be if the new mineral were such a mineral as might reasonably be expected would have been included if known. Here the new element would never have been included. Then again comes the answer, it must first be found. See *Lord Provost v. Farie*, 13 App. Cas. 657; *Hext v. Gill*, L. R. 7 Ch. 699; *Attorney-General v. Tomline*, 5 Ch. D. 750; *Earl Jersey v. Neath*, 22 Q. B. D. 555.

*Aylesworth*, Q. C., for the respondent. The Municipal Act (sec. 565) gave the township authority to lease the right to take minerals found upon or under this road. Natural gas is a mineral within both the scientific and

**Argument.** legal meanings: See definition of "mineral" in Imp. Dict. and Latham's Eng. Dict. Also article on Mineralogy in Encyclopædia Britannica; MacSwinney Law of Mines, pp. 11-17; Bainbridge on Mines and Minerals, pp. 1-4. A reservation of minerals includes every substance which can be got from underneath the surface of the earth for the purpose of profit. Per Mellish, L. J., in *Hext v. Gill*, L. R. 7. Ch. 699, at p. 712; *Attorney-General v. Tomline*, 5 Ch. D. 750, at p. 762; *Earl Jersey v. Neath*, 22 Q. B. D. 555; per Kay, J. *Midland R. W. Co. v. Haunchwood*, 20 Ch. D. 552; *Midland R. W. Co. v. Robinson*, 37 Ch. D. 386, and 15 App. Cas. 19. In Pennsylvania coal oil has uniformly been held to be a mineral: *Kier v. Peterson*, 41 Pa. St. 357; *Funk v. Haldeman*, 53 Pa. St. 229, at p. 248; *Dark v. Johnston*, 55 Pa. St. 164; *Thompson v. Noble*, 11 Morrison's Mining Reports 137; *Stoughton's Appeal*, 88 Pa. St. 198; and natural gas is treated as of similar character in *Johnston's Appeal*, 15 Morrison's Mining Reports, 556. No reason can be given for restricting the meaning of the word "mineral" as used in this statute. It has been laid down that the word "minerals," when used in a legal document, or in an Act of Parliament, must be understood in its widest signification unless there be something in the context or in the nature of the case to control its meaning. Per Lord Macnaghten in *Lord Provost v. Farie*, 13 App. Cas. 657, at p. 690.

*C. Robinson*, Q. C., in reply.

November 10, 1891. HAGARTY, C. J. O. :—

The statute declares that "the corporation of any township or county wherever minerals are found, may sell or lease by public auction, or otherwise, the right to take minerals found upon or under any roads over which the township or county may have jurisdiction, if considered expedient so to do."

Under this the township passed a by-law to authorize a lease for a year to parties for the purpose of boring for

and taking therefrom oil, gas, or other minerals in, upon, or under a specified part of the highway. This lease was given, and boring made, and natural gas found.

Judgment.

HAGARTY,  
C.J.O.

The substantial objection to this action of the municipality may be stated thus as in the reasons of appeal: "The term 'mineral' is inapplicable to natural gas which has not the characteristics of minerals properly so called, and no correct definition of the word can therefore be such as to include it."

Our learned brother, in his judgment, has very fully dealt with the authorities, and has come to the conclusion that natural gas falls within the meaning of minerals in the statute.

On full consideration I have arrived at the opinion that our learned brother could not properly have arrived at any other conclusion.

I cannot see how we can qualify the words used by the legislature. They give the right to "minerals."

Is then any enquiry properly open to us except whether this product falls within that description. Is it or is it not properly a mineral?

If one of the definitions cited by Mr. Aylesworth, be correct, it certainly is included in such words. "Mineral bodies occur in the three physical conditions of solid, liquid, and gas. There is reason to believe that the minerals we know as solids once existed in the liquid or gaseous state." Encyc. Brit. Mineralogy.

There was hardly any attempt to rebut or dispute the accuracy of scientific nomenclature in this kind of definition. The objection urged was mainly that the Legislature (especially at the date of the enactment) could not and did not intend to include natural gas under the term "minerals." There is nothing in the enactment to explain or narrow its ordinary meaning.

Latham's Dictionary, vol. 2, gas is defined as "an aeriform body as opposed to fluids and solids. Such is its meaning in chemistry. In the arts it chiefly means carburetted hydrogen and used for illumination." Citing

**Judgment.** Ure's Dictionary: "Gas is the generic name of all those elastic fluids which are permanent under considerable pressure," etc., etc.

**HAGARTY,**  
**C.J.O.**

In most of the cases as to what substances may pass as "minerals," there was something in the context or subject matter of the contract to assist the conclusions.

One of the most recent cases is *Lord Provost, etc. of Glasgow v. Farie*, 13 App. Cas. 657, decided by the Lords in 1888. The cases there are reviewed, and the well-known case of *Hext v. Gill*, L. R. 7 Ch. 699, is criticised. The Lord Chancellor expressed his regret (p. 673) that the test suggested by James, L. J., and which I think would have been the true one, and would have satisfied all difficulties, was not adhered to in *Hext v. Gill*.

The Lord Justice there said, (p. 719): "But for these authorities, I should have thought that what was meant by 'mines and minerals,' in such a grant, was a question of fact what these words meant in the vernacular of the mining world and commercial world and landowners at the end of the last century" (the date of the grant); "upon which I am satisfied that no one at that time would have thought of classing clay of any kind as a mineral." This was the kaolin or china-clay case.

The Lord Justice considered the authorities compelled him to decide the other way.

If we applied this test to our case, how would it be? What must the legislature have understood by this language?

It must have been that everything in the nature of mineral productions, except gold and silver, should be allowed to be leased or dealt with by the municipalities.

The roads were under their control, even if the soil remained in the Queen. It was not the case of a deed or grant between individuals. It was the handing over to the legal and responsible guardians of these highways, a general right to deal with "minerals." A most natural proceeding on the part of the legislature, and the only question that I think can be raised is, whether this "gas" falls properly under the name of a mineral.



No one can say that it is not a mineral, as said by the Lord Chancellor: "minerals, in old times, meant the substances got by mining, and I think mining in old times meant subterraneous excavations."

Judgment.  
HAGARTY,  
C.J.O.

There is no doubt that in the last half-century, a much wider significance is given to these words. Lord Herschell's judgment, although dissenting from the conclusion, is most instructive as to the meaning of these words in their position in a deed or grant.

The nature of "gas" is very fully discussed in Tomlinson's "Cyclopædia of Useful Arts," vol. 1, p. 736 (1866), under head of Gas and Gas Lighting; and again, vol. 2, p. 186, under head "Mineralogy" a full account of natural gas as a well-known phenomenon as far back as 1659. He says this case is probably the light carburetted hydrogen of chemists—the firedamp of the coalpit and marsh gas found abundantly in stagnant pools, etc. "In the strictest sense, a mineral is a natural inorganic body, with a definite composition, and a regular determinate form or series of forms."

I think the appeal must be dismissed.

It may be noticed that the case *In re Dudley Settled Estates*, 26 Solrs. Jour. 359, quoted by Mr. Robinson, is merely a short note that Hall, V. C., held that a lease for purpose of pumping up brine from a 250 feet depth to be evaporated for salt, did not fall within a statute requiring certain provisions to be inserted in leases of minerals. The brine was water impregnated with salt from rock salt deposits, and would otherwise have run away through the soil into the sea.

OSLER, J. A. :—

I think the judgment of my brother STREET should be affirmed for the reasons given by him. There is no evidence to shew that the word mineral, as generally used, does not embrace such a substance as natural gas.

The general consensus as to the ordinary and scientific meaning of the term is, that it does include it. In the context of the statute there is nothing which shews the word to have been employed in a restricted or peculiar sense,

Judgment.

OSLER,  
J.A.

nothing which compels us to hold that natural gas was intended by the legislature to be excluded from the general category of minerals.

We are therefore obliged to understand it in its widest signification, and consequently to hold that the plaintiffs fail in their appeal.

MACLENNAN, J. A. :—

The judgment of my learned brother STREET, which is the subject of this appeal, so fully covers the points involved, and it expresses my opinion so nearly, that I have little to add to what he has said.

There are, however, two or three grounds which were urged upon our attention which I think it well to observe upon.

It was contended that the legislature could not have intended to authorize a sale or lease to any but the owners of the adjoining lands, for they alone could reach the minerals without interfering with the use of the highway by the public as a road. I do not think, however, the statute can be so limited. If it had been so intended, I think it would have been so expressed. In other cases where the intention was the same it has been so expressed, as for example, when a road is closed a right of pre-emption is given to the adjacent proprietor. Here, however, power is given to sell or lease by public auction or otherwise. An auction *primâ facie* imports public and general competition, not competition between a limited class, and in the present case it would, if the argument is good, be between no more than two individuals in any case; and if the same person owned the land on both sides of the road, there could be no competition at all. Stress is also laid upon the provision that the lease should contain a proviso protecting the road for public travel, and preventing any uses of the granted rights interfering with public travel; and it was said that this meant that there must be absolutely no interference with or obstruction of

any part of the surface of the roadway, inasmuch as the public have a right to the use of every part at all times free from obstruction. And so it was contended that no one but an adjacent proprietor could observe such a proviso as it ought to be observed, and at the same time take the minerals. No doubt it is strictly correct to say that every part of a road from side to side is highway, and yet I think it is apparent that the legislature is not speaking in an absolute sense. All it says is that public travel is to be protected, and is not to be interfered with. It is not that no part of the highway is to be interfered with or obstructed, but it is the public travel that is protected. Besides, one of the rights which is authorized to be given is to take minerals found upon the road. That might be iron, or other mineral, in surface rock. If the argument is good no one at all could take that, not even the adjoining proprietor, for he could not come to take it without both interfering with and obstructing the road more or less.

Judgment.

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 MACLENNAN,  
J.A.

I think then it is clear that the selling or leasing is not restricted to the adjoining owners, but may be to any one; and that the purchaser or lessee may interfere with and obstruct the highway in his operations to a reasonable extent, so long as public travel is protected and not unreasonably interfered with.

I agree entirely in the conclusion that natural gas is a mineral within the meaning of this statute. I have always understood that in the scientific classification of the materials composing the globe, gases were included in the mineral kingdom, at all events, in modern science; and this is borne out by a reference to all the numerous treatises which have been cited, I think without exception.

In Dana's School and College Text Book on Mineralogy of the year 1863, (five years before this statute was passed) at page 15, the author states, "Our atmosphere and all gases occurring in nature, belong to the mineral kingdom." And at page 77, the gas in question is described. It is carburetted hydrogen, composed of seventy-five parts car-

Judgment.  
MACLENNAN,  
J.A.

bon, and twenty-five parts hydrogen ; and it is said that at Fredonia, in western New York, it is used for lighting the village ; and that a lighthouse on Lake Erie, is lighted with the same gas. In vol. 23, p. 813 of the last edition of the Encyc. Brit., it is stated that at the same village of Fredonia, this gas has been used for illuminating purposes since the year 1821. When this Act was passed therefore the kind of gas in question was a well-known mineral substance, and I see no reason whatever for excluding it from the class of substances intended by the legislature to be described by the term *minerals* used in this statute.

I think the appeal should be dismissed.

BURTON, J.A., concurred.

*Appeal dismissed with costs.*

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## HICKERSON V. PARRINGTON.

*Fraudulent preference—Action to set aside deed—Knowledge by grantee of insolvency—Valuable consideration—Actual intent to defraud—13 Eliz. ch. 5.*

The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S. O. (1887), ch. 124 (following *Molson's Bank v. Halter*, 18 S. C. R. 88), and where valuable consideration has been given, clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute 13 Elizabeth ch. 5.

Judgment of Divisional Court of the Common Pleas Division, affirming the judgment of ARMOUR, C. J., reversed.

THIS was an appeal from the judgment of the Common **Statement.**  
Pleas Divisional Court affirming the judgment of ARMOUR,  
C. J., at the trial.

The action was brought to set aside a conveyance of land as being void against creditors of the grantor, both under the Statute of Elizabeth, and R. S. O. ch. 124. The plaintiff being owner of the land in question subject to a mortgage, sold and conveyed it to the defendant, Mrs. Madill. It was arranged at the time of the sale that to enable the purchaser to build on the property the plaintiff should accept a note for \$660 of his purchase money, and Mrs. Madill arranged a loan of \$1,700 by mortgage upon the property, \$700 of which was applied in paying off the former mortgage, and the balance was to be advanced as the buildings progressed upon the certificate of a valuator. Before the whole proceeds of the mortgage had been advanced, it became apparent that Mrs. Madill would be unable to complete the buildings without some further financial assistance. At this time Mrs. Madill owed the defendant Parrington \$31 in respect of work done on the buildings, and still owed the plaintiff the \$660 of the purchase money for the land. The plaintiff asserted that while matters were in this position he entered into a verbal arrangement with Mrs. Madill to complete the buildings, on the promise that if she could not carry the matter

Statement. through she would transfer the property to him, and that in consequence of this arrangement he went on working on the buildings. Parrington, however, began to press for payment of his \$31, and to save himself he took a deed of the property assuming the mortgage and discharging his debt of \$31.

The trial judge found that at the time of the conveyance to Parrington the grantor was insolvent to the knowledge of the grantee, and declared the conveyance void as against creditors of the grantor. The Divisional Court following *Molson's Bank v. Halter*, 18 S. C. R. 88, declared these findings insufficient to dispose of the case, but found from the evidence before them that the conveyance was the result of an arrangement between Madill and Parrington to protect the property from the claims of the plaintiff and others, and was done for the purpose of defrauding the plaintiff and others of their just debts, and therefore dismissed the appeal of the defendants.

The defendants appealed, and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 29th of September, 1891.

*W. Nesbitt* and *J. McGregor*, for the appellants.

*W. D. McPherson* and *J. M. Clark*, for the respondents.

November 10th, 1891. BURTON, J. A. :—

The learned Chief Justice of the Queen's Bench, who tried this case, dealt with it only under our statute, and finding that the defendants Madill were insolvent to the knowledge of Parrington, and that the conveyance in question necessarily had the effect of defeating and delaying creditors, found as he could properly find, as the law was then supposed to stand, that it was fraudulent and void as against creditors; but there is no finding by the learned Judge as to any intent to defraud; and, speaking for myself in dealing with the case in appeal, I am not prepared to hold any such intent proved.

The learned Judge who delivered the judgment of the Divisional Court, however, held it void under the Statute of Elizabeth. I must confess my inability to fully comprehend the reasoning upon which that decision is arrived at.

Judgment.

BURTON,  
J.A.

I start with the fact that the defendant has assumed the mortgage that was then existing; that he has released his debt; that he has expended money which was absolutely required to be expended to make the property of any value, and has paid a trifling sum in cash. This, therefore, is not a voluntary deed, and as I have lately said in another case, quoting from Sir George Turner in *Harman v. Richards*, 10 Hare 81, that although a deed, even if made for a valuable consideration, may be affected by *mala fides*, those who undertake to impeach such a transaction on that ground, have a task of great difficulty to discharge.

If the learned Judge, who saw the witnesses, had found that, notwithstanding that the defendant paid what, upon a careful perusal of this evidence, I cannot help thinking was a fair price for the property, the sale was really made by the Madills for the purpose of defeating a particular creditor, or his creditors generally, and Parrington participated in that fraud. I can quite understand that it should not be allowed to stand.

It appears that Madill is a labouring man not much accustomed to business, and that the whole of these transactions, even to the borrowing and the distribution of the money, were done under the guidance of the plaintiff, who says Madill did not understand business and he did. He was no doubt disappointed when he found the buildings completed that he had not had the opportunity of finishing them himself; but we do not find, as we should have expected to find if the plaintiff's statement be true, that on discovering that Parrington had taken a deed of the property, he had said "you knew of my arrangement with the Madills, and it is not fair for you to step in. I am willing to pay you your account," which he admits himself he had told him was all right; but nothing of the kind

Judgment.  
BURTON,  
J.A.

occurs but on the contrary, when asked why he did not pay Parrington, he answers "I was not going to shell out any more of my money."

I should judge myself that anything that had taken place between the Madills and the plaintiff was nothing more than an offer, and that he so considered it, as when asked why he didn't repair the buildings and put them in good shape, he replies, "I did as I was instructed;" and then when asked, "Did you not think it your duty to avert an apparent disaster," he replies, "they would not give any more money upon the loan till the building was completed." Whereas that would have been no reason if in point of fact he had a concluded agreement with Mrs. Madill to advance money to complete it.

In another part of his evidence he would lead one to suppose that he had made that arrangement with Mrs. Madill, and was proceeding with the work on the strength of it, for he says, "I did as I told Mrs. Madill I would. She told me if they could not carry it through they would assign to me. I told her I would give twelve months to reclaim it. With that understanding I drew what money I had and put men to work straightening up the building and fixing the stone work, as far as I told you, out of my money;" and I may here remark that there is no evidence of what he did so advance; and in the action in which he recovered judgment he claims the \$660 only.

It is not shewn that there was any refusal to carry out that arrangement, if made, except by the sale to Parrington; and yet if made as the plaintiff asserts, six or seven weeks before that time, how was it that the buildings remained in the same unfinished and insecure state for three weeks before Parrington purchased?

Even if made, there is no satisfactory evidence that Parrington knew of it.

Parrington and the Madills both deny that any such arrangement was made.

On the other hand, we find this state of facts. The mortgagee had refused to advance any more money till the



buildings were completed. The Madills had no money—they had promised to pay Parrington's account at a particular day, but paid him only a part and promised to pay the difference within a few days.

Judgment.

BURTON,  
J.A.

I do not attach much importance to the alleged discrepancies between the statements of Parrington and the Madills, as to the way in which the arrangement came about, nor does it strike me as at all so unusual as to be discredited. I think it the most natural thing in the world for Madill to say, "I have nothing; this building, I hoped to complete I cannot, as they will advance me no more funds; if you can advance the money you may make enough perhaps to pay your account and something more." I do not suppose, unless he had come to the conclusion that he could make something more than the account, that Parrington would have touched it; but there was nothing improper in that, and it is, I think, quite consistent with Parrington's statement that he gave full value for the property.

I do not understand, that under the alleged agreement with the Madills, if carried out, the \$660 liability was to become a charge on the land, and the offer to these poor people to redeem in twelve months, would have been illusory, and I do not very well see how other creditors besides the plaintiff would have been benefited if the arrangement with him had been carried out. On the contrary, we have the broad fact that the defendant Parrington assumed the mortgage. I do not see a scintilla of evidence from which the inference can be fairly drawn against the Madills, that the transaction was a mere cloak for retaining some benefit to themselves; and if there was any intention on the part of the Madills to defeat the other creditors, of which I confess I see no evidence, there is none, at all events, to connect the defendant Parrington with such a scheme.

I think, with great respect, that the appeal should be allowed, and the action dismissed with costs.

Judgment. OSLER, J. A :—

OSLER,  
J.A.

The action is brought for the purpose of setting aside a conveyance of land made by the defendants Madill to the defendant Parrington, which is attacked as being void against creditors, both under the Statute of Elizabeth and the Assignments Act, R. S. O. ch. 124.

At the trial judgment was given setting aside the deed as being void under the latter statute, the only findings of fact being that the grantors were in insolvent circumstances when they made it, to the knowledge of the defendant Parrington. In the judgment of the Divisional Court on the motion of that defendant to set aside the judgment at the trial it is said that in the light of the decision of the Supreme Court in the case of *Molson's Bank v. Halter*, 18 S. C. R. 88, these findings were insufficient to dispose of the case, and that if they were the only findings which the evidence warranted the judgment should be set aside, and the action dismissed.

The plaintiff however contended, and the Court held, that a case was made out for setting aside the deed under the Statute of Elizabeth, and that the deed was the result of a fraudulent scheme or contrivance to defeat Madill's creditors, to which Madill and Parrington were parties.

They therefore upheld the judgment for the plaintiff, and Parrington now appeals.

The judgment of the trial Judge avoiding the deed as a preference under R. S. O. ch. 124 cannot, under the recent decision in *Molson's Bank v. Halter*, be supported; and it has hardly been contended that the Common Pleas Division were wrong in so holding. The question is whether they were wrong in holding the deed void under the Statute of Elizabeth.

The deed is founded on a valuable consideration, namely, the assumption of the mortgage on the lands, and satisfaction of the defendant Parrington's account of \$31 against the grantor.

The case, therefore, is one of that class in which in order to defeat the deed there must be proof of an actual and

express intent to defraud creditors, and the purchaser must be shewn to have been privy to such intent: *Re Johnson, Golden v. Gillam*, 20 Ch. D. 389; R. S. O. ch. 96, sec. 3, sub-sec. 1; *Middleton v. Pollock*, 2 Ch. D. 104. "A deed, though made for valuable consideration, may be affected by *mala fides*. But those who undertake to impeach for *mala fides* a deed which has been executed for valuable consideration have, I think, a task of great difficulty to discharge." *Harman v. Richards*, 10 Hare 81, at p. 89.

The property in question formerly belonged to the plaintiff who had bought it from a Mrs. Aikins for about \$835, probably not many months before the date of the impeached transaction. He sold it to Mrs. Madill soon afterwards for \$1,100, there being then due to Mrs. Aikins on account of his own purchase money, \$700.

In October, 1889, the defendant Madill mortgaged the land to a Mrs. Kirkpatrick for \$1,700, of which \$700 was advanced and paid in discharge of the prior mortgage to Aikins, and the balance was to be paid out from time to time as the houses which the Madills were about to build, or had commenced building, were progressed with.

Mrs. Madill appears to have left the management of everything connected with the buildings pretty much in the hands of her husband, and she adopted and approved of the transaction with the defendant Parrington.

The deed to Parrington was made on the 8th March, 1890, and is expressed to be in consideration of the assumption of a mortgage and of \$31.

Parrington's case shortly is, that on and before the 24th February, 1889, his co-defendants were indebted to him in the sum of \$71, on materials supplied for the buildings: that he was then paid \$40 on account, and that C. F. Madill promised to pay him the balance on the 6th March: that on that day Madill came to see him and to tell him that he was unable to pay: that Parrington insisting on payment Madill told him the only way he saw for him to get his money was to buy the property and finish the buildings: that he at first declined to do so, but on the

Judgment.

OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

following day went to see it and then offered to take it at the sum of \$1,570, which in his opinion was all it was fairly worth, assuming the mortgage and discharging his account. He was in fact to step into the shoes of the mortgagor and to get the benefit of whatever money had not yet been advanced, so that he should not have to pay more than the \$1,570; the face of the mortgage being \$1,700. To this the Madills assented, and having ascertained from the mortgagee's solicitor and valuator the position of the mortgage account, the deed was prepared and executed on the 8th March.

The amount really paid to Madill as the difference coming to him was \$10, but this was not quite accurate, as the account, as I make it out from the evidence, would stand thus:

Price to be paid according to Parrington's valuation .....	\$1570 00
Mortgage.....	\$1700 00
Account assumed .....	31 00
	—————\$1731 00
Credit amount received from mortgage balance of loan	178 35
	—————\$1552 65
Balance due Madill .....	17 35
	—————\$1570 00

The plaintiff was the foreman engaged on the buildings and a considerable sum still remained due to him on account of his purchase money. He knew of the mortgage to Mrs. Kirkpatrick, and he was in fact paymaster for Madill of the moneys which were being advanced from time to time on the mortgage, and the \$40 paid to Parrington on the 24th February were paid by him out of that fund, as Parrington knew.

The deed then having been made for a valuable consideration, we must see what proof there is of facts, which on the principle on which the Court intervenes in cases of this kind, will support the demand of the plaintiff that it shall be set aside as fraudulent.

It is not enough to prove that the result of the deed is to delay or exclude creditors. "Even though there



are some suspicious circumstances, a purchase will be held good unless it is shewn that it was a contrivance to defeat creditors, and that the purchaser was privy to it:" May Fr. Conv. 2nd ed. p. 80.

Judgment.  


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 OSLER,  
 J.A.

The evidence of the value of the property is so conflicting that it is in my opinion impossible to draw any satisfactory inference unfavourable to the defendant from the *quantum* of the consideration given by him. In other words, there is no clear and sufficient proof that the consideration was inadequate, and that the land and buildings were fairly worth more than he gave for them, looking at their then condition and situation.

It may be taken as proved, and it is so found by the trial judge that Parrington knew that the Madills were indebted and were unable to pay their debts, and that they had no other property out of which they could be paid. He possibly also knew that Hickerson's purchase money had not been paid, and that he had nothing but a promissory note of the debtors as security for it. It appeared too that some six or seven weeks before Parrington bought, Mrs. Madill had made a verbal arrangement with Hickerson by which the latter had undertaken to go on and finish the buildings, advancing whatever might be necessary for that purpose, and to pay outstanding accounts, over and above any balance which might be coming under the Kirkpatrick mortgage; and that she was to assign the property to him as security, and to have twelve months in which to redeem it. Madill denies that there was any such arrangement, and his wife was not examined on the subject; and if it ever existed, it is not clear that it had not been repudiated by the Madills before they sold to Parrington. Hickerson said that he had made some advances of his own money under it, and that he had told Parrington of it. This, Parrington denied, and there is no finding of fact upon the point, which is, I think, the turning point of the case. If there was such an agreement, and if Parrington knew of it, I should have found it very difficult to say that there was not some evidence,

Judgment.

OSLER,  
J.A.

looking at all the other circumstances of the case, that the Madills had conspired with him to cheat Hickerson by selling the property over his head, and thus to disappoint and defeat him of the opportunity he expected to have under the agreement of realizing his claim out of it. It may be conceded that, as the Court below held, there was such an agreement between the Madills or Mrs. Madill and the plaintiff; but if Parrington was not aware of it, I am unable, with great respect, to agree in the conclusion that the sale so far as he was concerned, was a contrivance under the pretence of securing his own small debt to protect the property against the plaintiff and the other creditors of the Madills.

There is certainly no tangible evidence that they were to retain any interest in the property, or that it was not, as regards them, a sale out and out, free from any secret trust in their favour.

The learned trial Judge has not dealt with the case from this point of view, and as neither he nor the Divisional Court has found notice to Parrington, I think we must treat it as not proved. The other circumstances relied upon as shewing *mala fides* are by no means conclusive, and in the absence of evidence that the consideration was entirely inadequate, and of notice to Parrington of the agreement with the plaintiff, they are perfectly consistent with the absence of any intention to defeat creditors.

The immediate inducement to buy the property, viz., the satisfaction of the debt of \$31, may have been trifling, yet the defendant may well have seen in it, and in the property itself when he should have completed the buildings, very good reasons for acquiring it; nor can I see that the transaction in itself, supposing that it was primarily suggested by the defendant's desire to be paid his debt, was so very singular and unusual a one to be entered into by a person in his position, as to justify the suggestion of indirectness or the existence of an improper motive on his part. The case should be looked at as if the purchaser

instead of being the defendant had been a person to whom the Madills owed nothing, but who was cognizant of their position towards Hickerson, and who had taken the property, paying them \$40 or \$50 and assuming the mortgage thereon. As regards any real ground for attacking the deed, I think Parrington stands in that position.

Judgment.

OSLER,  
J.A.

[The learned Judge then commented on certain discrepancies in the evidence of Madill and Parrington, and continued]:—

A good deal, too, was made in the argument, and it has been noticed in the judgment below, of the fact that the \$10 which Madill says he was to be paid is not mentioned in the deed as part of the consideration. But if the groundwork of the bargain was the valuation of the property, and that is a fact which must be taken as proved, there is nothing inaccurate in the way in which the consideration is stated, for it was the assumption of the mortgage, and of the account; and what might be coming to Madill was merely a matter of computation after ascertaining what Parrington was to get from the mortgagee as the balance of the loan. Madill should no doubt have been paid \$17.35, instead of \$10, and the attempt to account for the \$7.35 is rather lame and incomplete. But it is impossible to lay hold of that circumstance alone, or in connection with the fact (of which I think a most simple and natural explanation was given) that the \$10 was not paid for two or three days after the date of the deed, as shewing that the transaction was unreal or other than what it purports to be.

On the whole, I have arrived at a firm opinion that the existence of a valuable consideration dominates every circumstance which might be regarded as suspicious, and that the appeal must be allowed.

HAGARTY, C. J. O., and MACLENNAN, J. A., concurred.

*Appeal allowed with costs.*

## CAMPBELL v. ROCHE.

## McKINNON v. ROCHE.

*Assignment and preference—Money advanced to insolvent to pay creditors—  
Action to set aside security—Consideration bad in part.*

Two actions brought to set aside two chattel mortgages as void under R. S. O. ch. 124 were tried together. In the first case the mortgagee being surety for a debt of the mortgagor raised money and advanced it with a large additional amount to the mortgagor who was then in insolvent circumstances to the knowledge of the mortgagee receiving therefor the mortgage in question. The insolvent thereupon paid the debt for which the mortgagee was surety and other notes on which relatives were indorsers out of the money thus raised :—

*Held*, that the mortgage was valid.

*Semble*, that it would be so whether the mortgagee knew of the insolvent's intention to apply the moneys to pay off certain creditors in preference to others or not.

In the second case, it was shewn that the mortgage was unreal and fraudulent as to \$500 part of the alleged consideration of \$4,000 :—

*Held*, that it was therefore void as to the whole, following *Commercial Bank v. Wilson*, 3 E. & A. R. 257.

Judgment of Boyd, C., in the first case reversed and in the second case affirmed.

**Statement.**

THIS was an appeal from the judgment of Boyd, C., delivered at the trial in two actions tried together before him, brought to set aside two chattel mortgages as void under R. S. O., ch. 124, the facts being as follows:— In the first case Danford Roche being in insolvent circumstances applied to the defendant Patterson, his uncle, for a loan of \$5,000. Patterson raised the money in two sums, by a mortgage on his own house for \$3,000, the proceeds of which he paid to Roche, and by a note for the balance, which he delivered to Roche who discounted it; Patterson taking as security for the whole \$5,000 the chattel mortgage now in question. The money thus obtained was for the most part applied in taking up notes of the insolvent endorsed by relatives of his of whom Patterson himself was one. It was quite clear that Patterson when he advanced the money knew of the insolvency, but there was some doubt as to whether he knew how the money was to be applied.



In the second case the consideration for the mortgage <sup>Statement.</sup> sought to be set aside was obtained for a similar purpose of taking up notes of Roche endorsed by his friends. The mortgage was given to one William Mader but it appeared that \$500, part of the consideration, though alleged to have been advanced by Mrs. Danford Roche, the wife of the mortgagor, was in fact the mortgagor's own money.

The learned Chancellor gave judgment at the trial on the 17th of May, 1890, setting both mortgages aside. The defendants Patterson and Mader appealed and the appeal came on to be heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 5th, 6th, and 7th of October, 1891.

*Moss*, Q. C., and *Thomson*, Q. C., for the appellants.

*McCarthy*, Q. C., and *Laidlaw*, Q. C., for the respondents.

November 10, 1891. HAGARTY, C. J. O.:—

I am compelled—not without regret—to agree with my learned brothers that the judgment setting aside the Patterson mortgage cannot be supported on the evidence. My regret arises from the painful belief that we have not heard the whole truth of this dealing between the defendant Patterson and the insolvent, the chief actor in this not very creditable failure. It is impossible to read what is legally in evidence without the strongest suspicion that the learned chancellor was right in his opinion as to the hollowness of the case. That the defendant Patterson could be ignorant of the hopeless insolvency of Roche, after his repeated extensions, or could have believed that an advance of \$5,000 for two months at twelve per cent. interest in advance, could have retrieved his commercial position is beyond my belief. However, the direct evidence fails to prevent the operation of our law as to insolvency, in protecting this advance.

If I had been the trial judge and forced to dismiss the assignee's suit to set aside this mortgage I should certainly

Judgment.

HAGARTY,  
C.J.O.

have not given costs to the mortgagee. Had the whole of the alleged advance to the insolvent been money obtained from the bank on endorsement by Patterson under the same circumstances as attended the \$2,000 note, I should have hesitated long before holding it to be a cash advance. But \$3,000 of the whole was actual cash, and the dealing with the note may be considered as the part carrying out of the original bargain to advance the whole \$5,000. I do not express any opinion as to what would be the effect of an advance in money being made with express notice that it was to be applied in payment of debts by way of preference.

BURTON, J. A.:—

These were two actions growing out of the failure of Danford Roche—one impeaching a mortgage given by him to Doctor Patterson, the other a mortgage to William Mader—and were unfortunately, as I think, tried together, a great deal of evidence which might be properly receivable in the one case being in consequence admitted which was not evidence in the other; and although the cases were tried without a jury, it is impossible sometimes in cases of this kind to excise the statements which are not evidence.

I shall endeavour to treat them separately, and shall first deal with Dr. Patterson's mortgage.

I think it pretty clear that at the time this suit was instituted the plaintiffs were under the impression that the impeached deed was voluntary and without consideration, was not a real transaction; in other words, was but a mere cover to protect the goods from creditors.

There was no foundation for this assumption—it being proved beyond all question that Dr. Patterson raised \$3,000 by mortgage on his house, and that he raised a further sum of \$2,000 from the Ontario Bank, which moneys were paid by him into the hands of Danford Roche as the consideration for the mortgage.

It is now said that the whole scheme was a fraud for the purpose of securing a preference to members of the

family, who had come under liability for the insolvent and so far reaching as to extend to the purchase of the stock by the mother of the insolvent when brought to sale by the assignee some months afterwards; and there is much no doubt to cause suspicion, but I think the evidence falls far short of establishing any such fraudulent scheme, nor is there, in my opinion, any evidence upon which a Court would be safe in acting of any actual knowledge on the part of Dr. Patterson as to the purpose to which the money advanced by him was to be applied, even if that knowledge would in the present state of the law invalidate the transaction.

We cannot, in the first place, overlook the fact that Dr. Patterson did raise this money and did pay it to the insolvent; and although a deed, even if made for a valuable consideration, may be affected by *mala fides*, as remarked by Sir George Turner in *Harman v. Richards*, 10 Hare 81, those who undertake to impeach such a transaction on that ground have a task of great difficulty to discharge.

I may join in the learned Chancellor's regret as to this state of the law, if it be as I think it is; but that is more a matter for the consideration of Parliament who refuse to pass a Bankrupt Act, than for the Court, which is simply to place a construction upon the Act which is intended to supply that deficiency.

I do not, however, think that there is any thing so out of the ordinary course in the manner in which this \$2,000 was raised to call for the strictures of the learned Judge, or to induce the belief that it was any less substantial than the \$3,000 transaction. The learned Judge seems to have been under the impression that it was done after the date of the mortgage, and was in fact a mere discount by the insolvent on his own account in the usual course of business. That would be so, undoubtedly, if it was not in evidence confirmed by the production of the cheques themselves that the proceeds were forwarded to Dr. Patterson and not advanced to the insolvent until he had executed the chattel mortgage. Nor does the dividing it into two sums

Judgment.

BURTON,  
J.A.

Judgment.  
BURTON,  
J.A.

impress me unfavourably, as it appears to have impressed the learned Judge; it was probably intended to conceal the true nature of the transaction from the bankers. But, if so, the veil would seem to me to be a very light one, and scarcely likely to have the effect intended. But the substantial question is, whatever the form, who got the money? and I can come to no other conclusion in this case than that the evidence of Dr. Patterson is not only uncontradicted but affirmed.

Nor do I agree with the learned Judge that the note so discounted was not paid by him. The bank evidently got alarmed at hearing of the mortgage given by him upon his house, and in order to satisfy them, he did pay off, from money loaned to him by Mrs. Roche, one-half of the amount, and granted his note for the difference, which he has since paid from the money placed in his hands by the assignee to abide the event of this suit, and which money he has now paid over to the assignee; that note was paid therefore from his own means, and I think it impossible to say that the full sum of \$5,000 was not advanced by Dr. Patterson to the insolvent.

I think we are bound to credit the statement of Dr. Patterson that he had no actual knowledge of the intended disposition of the money; and without entering upon the enquiry as to whether the knowledge of the attorney can be imputed to Dr. Patterson, I think it sufficient to say that that knowledge would not, in my opinion, affect the validity of his security.

The learned Chancellor appears to have treated the preferential payment of a debt as a *malum prohibitum*—something illegal and wrong. But the payment of money to a creditor in discharge of his debt is not forbidden; on the contrary it is expressly excepted from the operation of sec. 2, even though it is manifestly a preference. It may be said to be an evasion of the statute to borrow money in this way and apply it to the payment of preferred creditors, but that can scarcely be successfully urged if the act intended to be done does not fall within the prohibition.



He seems to have considered that the words "made in the ordinary course of trade or calling," to be found in the exception of a *bond fide* sale or payment so made to innocent purchasers or parties should be read into this exception of payment to a creditor; but I think with great deference that we are not entitled to take that liberty with the statute, and the point was not pressed before us; and it is, I think, made clear that no such restriction was intended when we refer to the previous legislation on the subject, when such payments were protected only if an assignment for the benefit of creditors was not made within a month after the payment.

I am of opinion, therefore, that in the suit against Patterson, the appeal should be allowed, and the action dismissed with costs.

Then as to the Mader mortgage, it stands on somewhat different grounds, and it may be regarded in the same way as if the transaction had been carried out in the name of Julius R. Mader, who was the *alter ego* of Danford Roche.

The learned Judge has found as a fact that the \$500 was Danford Roche's own money, and the whole thing has a most suspicious appearance; and he finds also that there was no debt due by Danford Roche to the mother. So that in that view of the matter the \$2,500 paid to her was all the time Danford Roche's money, and on the ground mentioned in *Commercial Bank v. Wilson*, 3 E. & A. R. 257, which is binding on this Court, the mortgage must be held void in toto.

I think, therefore, that as to this transaction the judgment should be affirmed.

OSLER J. A. :—

These actions were tried together. The object of the first is to set aside as fraudulent against the creditors of Roche a chattel mortgage given by him to the defendant, Bradford Patterson: and of the second, to set aside on the same ground another given by him to the defendant

Judgment.

BURTON,  
J.A.

**Judgment.** Mader, on other property. The only fact common to the cases is that the defendant Roche is the maker of the impeached instruments. In other respects the cases of the principal defendants are so entirely distinct that I cannot but think it was unfortunate that they should have been tried together.

**OSLER,  
J. A.**

As regards the case of the defendant, Patterson, I am, with great respect unable to agree that this mortgage ought to be set aside.

It is undeniable that \$3,000, part of the \$5,000 secured by that mortgage, was in fact procured by Dr. Patterson from one Wales, for the purpose of being advanced and lent, and that it was in truth advanced and lent by him to the defendant Roche upon the security of the mortgage. The remaining sum of \$2,000 was, and is, as I venture to think, in exactly the same position, save only that it was procured by means of discounting a note, the proceeds of which were in like manner lent by Patterson to Roche in compliance with a fulfilment of his agreement to lend him \$5,000, if he could himself raise that sum for that purpose.

The plaintiff's case on this point is that Patterson simply gave Roche the note to use in his business, and not for the purpose of raising money on it to complete the loan; and that so far as the note transaction was imported into the mortgage, and the proceeds attempted to be treated and secured as part of the loan, it was a mere sham and fraud upon creditors, so that the security being to that extent tainted it falls to the ground altogether.

So far, however, as the defendant Patterson is concerned the loan appears to me to have been, as regards the \$2,000 as well as the \$3,000, a perfectly fair and straightforward transaction. The only shadow of suspicion thrown upon it arises from the fact of Roche's having, before transmitting the proceeds of the discount to Patterson, lodged them to his own credit in the bank where the discount was made and where he kept his account. This was done wholly without Patterson's authority or knowledge, and cannot in the face of the other evidence respecting the

arrangement justify an inference adverse to the lender. It is shewn that he had attempted unsuccessfully to borrow the \$2,000 from a bank in Barrie, and he resorted to the bank in Newmarket because he thought the manager there, who was a friend of his, would be likely to discount the note. There is nothing that I can see to discredit his statement that the money to be raised upon that note was, until he lent it to Roche, his own money, and it was with reasonable promptness, paid over to him as such by Roche, to whom he had entrusted the note for the purpose of getting it discounted. I can conceive of no reason for that being done if it was not in accordance with the arrangement between the parties that Patterson should be the borrower of the money in the first instance, lending it to Roche and taking his security. The manner in which the money was passed into Patterson's hands has been much commented on as if something sinister or fraudulent was concealed or covered by it. It seems to me, with all respect, to be nothing more than an instance of the way in which a tradesman will endeavour to mystify his banker by making his account look more sound and substantial than it really is. Looking at the nature of the proposition which had been made to Patterson to lend the \$5,000 on mortgage security; at the fact that it would be necessary for him to borrow it himself, in order to do so; that he had already borrowed \$3,000 from Wales, and had tried to borrow \$2,000 in the very way in which it was afterwards procured, there is no fair ground for suspicion, so at least the evidence strikes me, that the \$2,000 raised on the note was not in truth and fact money borrowed by Patterson to be lent to Roche on the promised security.

The accommodation to Roche might have taken another shape, that namely which the plaintiff insists it did take. But if that had been the real nature of the transaction, the parties could just as easily and effectually have given and taken a valid security for it in another form, under the Chattel Mortgage Act, and there is no reason why they should not have done so, but the fact that the bargain was

Judgment.  
OSLER,  
J.A.

Judgment.

OSLER,  
J.A.

really a different one which is truly represented by the mortgage actually taken.

The mortgage then having been taken for "a present, actual *bonâ fide* advance of money," within the very words of one of the exceptions from section 2, mentioned in section 3, subs. (1), of the Assignments and Preferences Act, on what ground is it to be declared utterly void as being within the former section? Every presumption made in favour of a conveyance which is founded on valuable consideration, but which is sought to be avoided under the statute of Elizabeth, must equally be invoked in support of the appellant's security. *Harman v. Richards*, 10 Hare 81, 89; *Re Johnson*, 20 Ch. D. 389. And unless an actual and express intent can be shewn to have existed on the appellant's part in advancing the money to aid the mortgagee in doing something forbidden by the Act; or unless he appears to have been actually privy to such intent on the part of the mortgagor, the conveyance is not invalidated. Nor is it enough that the evidence raises a suspicion that the lender may have been aware of the borrower's wrongful intention, and I find no authority for saying that he is bound to look to the application of the borrowed money. The fact that a debtor is insolvent, or on the eve of insolvency, does not affect his power to borrow money on the security of his property, and to give a valid security therefor, even though the lender may know, or have reason to know the state of his affairs, provided always the latter is ignorant of any intention on the part of the former to contravene the provisions of the statute, for then the security is taken for a present actual *bonâ fide* advance in money, and is not within the second section of the Act.

The case is not within the latter part of sub-section 4 of section 3, which provides that a security given to a creditor for a pre-existing debt, shall not be invalidated, where by reason or on account of the giving of the security an advance in money is made to the debtor by the creditor on the *bonâ fide* belief that the advance will en-



able the debtor to carry on his trade or business and pay his debts in full, for the security was not taken for a pre-existing debt, nor indeed was Patterson then a creditor of Roche.

Judgment.

OSLER,  
J.A.

It is urged, however, that the advance was not *bonâ fide*, because the lender knew that it was to be applied by Roche in making payments to particular creditors, and in relief of persons, of whom he was one, who had become security for him by endorsing his paper.

I am, with deference, of opinion that there are at least two answers to this contention: the first being that the evidence so far as it is admissible against Patterson does not justify the conclusion that he knew of the disposition which Roche had directed his brother to make of the borrowed money, in so far as it differed from that recited in the mortgage: the second, that as the Act has not forbidden the preference of a creditor by payment of his debt in money, a security given by a debtor for money lent for that purpose is not invalidated by the Act. I have in more than one case given my reasons for thinking that the Act has expressly excepted from its operation the payment of money to a creditor, as being something different from the "payment of goods" mentioned in the second section and from the "payment made in the ordinary course of trade or calling to innocent \* \* parties," which is also an exception from section 2 mentioned in section 3, sub-sec. (1). I need not repeat my reasons at length, but it appears to me that the course of the legislation on the subject compels the construction which I adopt. I refer to 48 Vic. ch. 26, sec. 3, and sub-sec. (3); 49 Vic. ch. 25; 50 Vic. ch. 19, sub-secs. 1, 3, and also to the reasoning of the decisions upon sub-secs. 133, 134 of the Insolvent Act, 1875, which, when the difference between the language of those sections and of the legislation we are now dealing with is considered, appears to me to fortify the construction which the appellant contends for: *Smith v. Hutchison*, 2 A. R. 405; *Nelles v. Paul*, 4 A. R. 1.

The Legislature has chosen to except from the operation

Judgment.

OSLER,  
J.A.

of the Act "any payment of money to a creditor," and I do not think we should be justified in interpolating the expression "*bonâ fide*" in that clause in order to infer that if the creditor had notice that the debtor was in a state of insolvency when he made it, it was a payment *malâ fide* and forbidden by the Act. The enactment is on this very point distinguishable from the 92nd section of the Imperial Bankrupt Act, dealt with in *Tomkins v. Saffery*, 3 App. Cas. 213, at p. 236. By the latter part of that section it was enacted that the section should not "affect the rights of a \* \* payee *in good faith* and for valuable consideration." And it was held that a creditor receiving payment with knowledge that he who made it was a person unable to pay his debts as they became due from his own moneys, was not a payee in good faith within the meaning of the Act.

It is said that Patterson knew that his endorsement held by McKinnon, was to be taken up out of the proceeds of the loan. He denies this, but assuming it to be true, I cannot see that it brings the case within the Act. He was not obtaining a preference thereby, for though a surety he was not a creditor of Roche in respect of that particular transaction. I refer to *Hope v. Grant*, 20 O. R. 623; *Ex parte Stubbins*, 17 Ch. D. 58, at p. 68; *Molson's Bank v. Halter*, 16 A. R. 323; *Nelles v. Paul*, 4 A. R. 1.

The construction placed upon section 3 by the learned Chancellor, was not attempted to be supported by the learned counsel for the respondents, and for the reasons I have stated, I am, with great deference, unable to adopt it.

In short, if the payments made by the debtor with the money borrowed cannot be recovered by an assignee under sections 7 and 8 of the Act, there appears to me to be an insuperable difficulty in holding that the security given to the person who lent the money with which they were made, can be successfully attacked.

As to the contention which was pressed on us with so much force by Mr. McCarthy, that the mortgage of the Barrie stock to Patterson on the 24th December, and of

the Newmarket stock to Mader on the 10th January, were parts of a single conspiracy, device, scheme, or contrivance by Roche to defraud his creditors, I can only say, that while concurring fully with the observation of the learned Chancellor upon Roche's conduct, no such case as that is made on the pleadings, and that the evidence absolutely fails to convict Patterson of any complicity with or knowledge of the existence of such a scheme.

Judgment.

OSLER,  
J. A.

The case of the defendant Mader in the action of *McKinnon v. Roche*, is more difficult to support.

He seems to have placed himself in the hands of his brother Julius Mader and Roche, and to have allowed them to use his name for their own purposes. I cannot say that the evidence does not fully justify the Chancellor's finding that he was their mere figure-head or cats-paw. Of the money which his mortgage purports to secure, \$500 was Roche's own money fraudulently transferred by him through Pearson to his wife. There was as to that sum, at all events, no real borrowing, no real lending, indeed as to the whole it might properly be inferred that Julius Mader or Roche were the borrowers, so far as there was a real borrowing. But the inclusion of the \$500 in the security would, on the ground and on the authority of the case cited in the judgment, *Commercial Bank v. Wilson*, 3 E. & A. 257, vitiate the whole instrument, and the result is that the appeal in the second suit fails, and must be dismissed with costs.

MACLENNAN, J. A., concurred.

*Appeal allowed in first case and dismissed  
in second case with costs.*

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## THOROLD v. NEELON.

*Company—Corporate act—Appropriation of payments on stock—Informal action of directors—Shares wrongly treated as paid up—Rights of holder without notice.*

An agreement was entered into between a company, certain of its shareholders and the defendant, who was vice-president of the company, whereby it was agreed that the shareholders should procure certificates for the amount of certain stock of the company held by them which was to be fully paid up, and should transfer the same to the defendant in consideration of advances of money to be made by him to the company. One of these shareholders held 188 shares of stock with forty per cent. paid up thereon, and being unable to pay up the remaining sixty per cent., it was suggested at a meeting of the directors that for the purpose of enabling the agreement to be carried out, the payments upon the 188 shares should be wholly applied to seventy-five shares which should then be transferred to the defendant as fully paid up shares. This suggestion was acted upon by an entry being made in the company's books of the transfer to the defendant of the seventy-five shares as paid up stock, but no resolution authorizing this appropriation was passed, nor was the company's certificate for such stock procured. All the facts in connection with the appropriation of these shares were known to the defendant :—

*Held*, in an action by judgment creditors of the company, that the intended appropriation was not made with the authority of the company by any corporate act, and that therefore there remained sixty per cent. still unpaid on the seventy-five shares for which defendant was liable :—

*Held*, also, as to other shares only partly paid up which had been improperly recognized as fully paid up by the directors, whose action in regard to them had been confirmed by a general meeting of shareholders, that they must be treated, as against creditors of the company, as fully paid up shares in the hands of defendant as a transferee for value without notice of the actual facts.

**Statement.**

THIS was an appeal by the plaintiffs from the judgment of the Divisional Court of the Chancery Division, reported 20 O. R. 86, affirming the judgment of FERGUSON, J., dismissing the action with costs, which was heard before this Court (HAGARTY, C. J. O., BURTON, OSLER, and MACLENNAN, JJ.A.) on the 17th of September, 1891.

The action was by judgment creditors of the St. Catharines and Niagara Railway Co., a company incorporated by 44 Vic. ch. 73 (O.) against the defendant as a shareholder upon whose shares as alleged a sufficient amount remained unpaid to satisfy the plaintiffs' judgments.

A number of the defendant's shares had been acquired by him from shareholders who appeared in the company's books to hold them as fully paid-up shares. Whether these shares were in fact fully paid up was questionable,



a discount having been allowed in respect of them under <sup>Statement.</sup> circumstances which apparently did not authorize it, but the defendant had no notice of the facts in connection with them, the circumstances by which they had come to be treated as fully paid up having taken place prior to his connection with the company.

As to the remaining shares held by the defendant the facts were as follows:—The defendant, being a director and vice-president of the company, agreed to advance \$100,000 to the company, he to be secured therefor in part by a transfer to him of certain shares to be fully paid up, then held by certain of his co-directors, it being further agreed on the part of the then holders of these shares that they would procure certificates for the amounts of such stock fully paid up and held by them respectively and transfer the same to the defendant. One of the directors named Blain who had so agreed to transfer, had 188 shares standing in his name in the company's books at the date of the agreement, upon which there was then paid the sum of \$3,750, the shares being \$50 shares. When the time came for the transfer to be made, Blain found himself unable to pay up the balance due upon his 188 shares and, as the defendant would accept none but what were fully paid up, a suggestion was made at a meeting of directors that the whole \$3,750 paid by Blain on his whole stock should be applied exclusively to seventy-five of his shares so that such seventy-five shares being thus paid in full might be transferred to the defendant. This suggestion was assented to by those present, but no resolution of the board was passed authorizing this appropriation; the secretary sent a transfer of the seventy-five shares to Blain who executed it; the transfer was accepted by the defendant and an entry was made in Blain's account in the stock ledger, "Transferred by D. Blain to S. Neelon 75 shares paid-up stock." These circumstances were fully known to both Blain and the defendant, and it was understood amongst them that the defendant held these seventy-five shares fully paid-up, and that Blain held the balance of his shares with nothing paid on them.

**Argument.**

*Robinson, Q. C., and Herbert Collier, for appellants.*

The defendant's shares, other than those he got from Blain, were not fully paid up. The fact that he relied on the representations of the secretary of the company, that they were fully paid up will not relieve him; as he was vice-president of the company for nearly a year prior to his acquiring the shares in question, and had access to the stock ledger showing how, when, and to what extent each director got his discount.

As to the shares which the defendant got from Blain, the alleged act of the directors in converting one hundred and eighty-eight shares partly paid-up into seventy-five fully paid-up shares, and one hundred and thirteen shares with nothing paid on them, was illegal and void. By sub-secs. 8 and 9 sec. 22, of the Railway Act, R. S. C. ch. 109, the power to declare shares forfeited for non-payment of calls is lodged with the shareholders generally, and the directors could not deprive them of this right by placing seventy-five shares beyond the reach of forfeiture: *In re Almada Tirito Co.*, 38 Ch. D. 415; *Flitcroft's Case*, 21 Ch. D. 519; *Miles v. New Zealand Co.*, 32 Ch. D. 266, at p. 286; *Page v. Austin*, 10 S. C. R. 132 at p. 155.

*W. Cassels, Q. C., and R. G. Cox, for respondent.* The shares in question were transferred to the defendant as paid-up shares, and were represented to be fully paid up by the proper officers of the company. As to the shares other than those obtained from Blain, they had been treated as fully paid-up long before the defendant became a director of the company, and he had no notice or knowledge of their being otherwise at the time of their transfer to him; *Ex parte Sandys*, 42 Ch. D. 98.

As to the shares obtained from Blain, they were transferred to defendant under a contract to which the company were parties, and under which the defendant was entitled to receive fully paid-up shares. The arrangement of crediting the whole of Blain's payments upon seventy-five shares was for the company's benefit, and did not prejudice any creditor of the company, and was made in good faith to enable the company to proceed with the

construction of its line. The plaintiffs cannot succeed Argument. unless the transaction is absolutely *ultra vires*, but it is at most a breach of trust and cannot be attacked by an outsider; *McCracken v. McIntyre*, 1 S. C. R. 479. As to absence of formal resolution of the board, see *In re Branksea Island Co.*, 1 Meg. 23, Mews Consol. Dig. Supp. p. 386.

*Robinson*, Q. C., in reply.

10th November, 1891. HAGARTY, C. J. O.:—

The agreement bears date 1st November, 1887, the defendant then being a director. It declares that the seven persons named in the schedule (being directors) held the named quantities of paid-up stock. David Blain is stated to hold 188 shares. The directors (parties of the second part) agree to procure certificates for the said amounts of stock fully paid up and transfer them to the defendant. The defendant covenants that upon the paid-up stock being transferred to him he will make the advances. The defendant is to retransfer to the directors any of the stock on payment to him of "the nominal or par value."

At that time Blain held this stock with forty per cent. paid thereon \$3,750. The secretary proved several attempts to get Blain to pay the remaining sixty per cent. so as to complete the arrangement with the defendant.

On the 15th November, the failure of the Central Bank apparently disabled Blain from fulfilling his contract.

There was a meeting on November 30th, at which the secretary, Mr. Wood, states the matter was discussed; that he suggested the idea of making out a certificate of seventy-five of Blain's shares, as fully paid-up shares, applying all he had paid up, especially to them, and the board seems to have agreed to this. This resolution was carried:—

November 30th, 1887.

Moved by H. A. King, seconded by W. W. Greenwood, that the secretary be ordered to obtain the necessary transfers from the directors, and Mr. Shields, except Mr. Neelon,

Judgment.

HAGARTY,  
C.J.O.

in compliance with an agreement made November 1st, 1887, and that the transfers when completed be brought to this board for acceptance by S. Neelon. Carried.

This resolution is the only written evidence produced to shew any corporate action in regard to the secretary's dealing with these shares.

After several applications Mr. Blain executed a transfer of seventy-five shares to the defendant, bearing date 1st December, 1887, assigning "in consideration of the sum of \$3,750 paid to me by Sylvester Neelon of, \* \* etc., seventy-five shares of the stock of St. Catharines and Niagara Central Railway Company," to hold to him absolutely "subject to the same rules and orders, and on the same conditions that I hold the same immediately before the execution hereof." At the foot Neelon signs his acceptance "of the said seventy-five shares subject to the same rules, orders, and conditions."

It is clear that Blain assented to the money paid by him being applied to the seventy-five shares, as he knew defendant was only to get paid-up stock, wishing to carry out his contract with him under the agreement, leaving the remainder of his stock with nothing paid on it. He says that no arrangement was made as to the remaining stock, and that he did nothing beyond signing the transfer. He had intended, until his difficulties arose, to have paid up all his stock in full to carry out the agreement.

Shortly after the date 1st December, the transfer was accepted by the defendant and the secretary made an entry at foot of Blain's stock account. This is produced from the books:

*Mr. David Blain, in account with the St. Catharines and Niagara Central Railway Company, 1887:*

Mch. 14 To 188 Shares Cap. Stock trans'd		
by Dr. L. S. Oille at \$50 each.	\$9,400 00	
By Cash paid on Stock . . . . .		\$3,750 00
By Balance due on stock . . . .		5,650 00
		<hr/>
1887.	\$9,400 00	\$9,400 00
Dec. 1 Transferred by D. Blain to S. Neelon 75 Shares paid-up Stock..		\$3,750 00



As far as written evidence is concerned we have now everything before us.

Judgment.

HAGARTY,  
C.J.O.

It is clearly proved that the defendant would only accept paid-up stock, and that he and the secretary and the other directors so far as verbal evidence is concerned considered that the effect of this operation was to make these seventy-five shares paid-up stock. The residue of Blain's stock remains in the company's books standing unaffected by any change or fresh disposition.

Stress seems to be laid in the Court below on the fact that the defendant took this transfer in good faith on the representation of the company's officers that it was paid-up stock. He certainly took it in good faith, as to believing it was paid up.

But he had, I think, the fullest notice of everything connected with the whole arrangement from the beginning to the end. He was, as vice-president and director, fully aware of the difficulty as to Blain's position, present at the meeting of 30th November, when the secretary suggested the plan afterwards carried out, and fully cognizant of the fact that forty per cent, of the amount paid on the remaining stock was applied to his seventy-five shares.

Under these circumstances, the question seems to rest wholly on the legality of the transaction by which he claims that these shares, with forty per cent. paid, have been converted in his hands into shares with the sixty per cent. paid up.

The difficulty lies at the threshold of the enquiry—the total absence of any evidence of any corporate action whatever, authorizing this dealing.

Before discussing the company's right thus to deal with Blain's stock, we must ask what does it appear that they have done.

There is the resolution of the board that the secretary do obtain the necessary transfers from the parties under the agreement.

If these transfers had been duly obtained, then the directors might have fulfilled their agreement to procure

Judgment.  
HAGARTY,  
C.J.O.

certificates for the amounts of stock fully paid up, and transfer same to the defendant.

But no such certificate was ever prepared or given to the defendant.

The secretary says he could not have given such a certificate; that he uses the company's seal therefor, and the president signs such certificate, and the secretary would have to get authority to issue such a document.

Thus, this whole dealing rests on verbal testimony.

Blain's transfer states, in consideration of \$3,750, he transfers seventy-five shares. Each share is \$50, so we may infer that this was all the money he has paid on his whole stock. But he does not even call it paid-up stock, and specially states it to be subject to all the rules, orders, and conditions that he was under.

I feel very great difficulty in holding that we have any legal evidence before us to establish the main fact as to any action of the company.

Their books offer no proof. Blain remains the owner of all the remaining stock.

I do not think anything is shewn sufficient to bind a corporate body without resolution or something equivalent to bring the case within the remarks of Bowen, L. J., in *Miles v. New Zealand Co.*, 32 Ch. D. 266 at p. 289.

He suggested that if verbal evidence shewed that the company had dropped some threatened proceedings on a guarantee being given to them, that might be a sufficient consideration therefor.

Cotton and Fry, L.JJ., differed from his view. They both consider that there must be some corporate action in the way of resolution to bind them, and that mere statements at a meeting by individual members that they were satisfied with the guarantee, would not in any way bind the company.

If the company had issued a certificate to the defendant that he held seventy-five shares of paid up stock according to the agreement, the case would be somewhat different. Here the whole dealing proposed by the agreement,

remained *in fieri*. Certificates were to be issued and transfers executed to complete the dealing with the stock.

Judgment.

HAGARTY,  
C.J.O.

On the evidence before us, how would the remaining Blain stock stand? Could the company compel him to pay up the same on call? Could he shew anything binding on the company in bar of these claims? If his creditors claimed to seize and sell it on execution for its forty per cent. value paid, could they be barred? Of course the question here is as to the defendant. Does he legally hold paid-up stock, or stock with sixty per cent. still unpaid?

It can only be by some action of the company—assuming that they have power so to do—that the seventy-five shares are changed from their original position into paid-up stock. The company are parties to an agreement to have certain things done, but those things as to Blain's stock have never been done as agreed. I fail to see evidence of any such action as the law requires.

It is a matter of the gravest importance in all dealings with or by a corporate body that its actions shall be evidenced not by verbal statements or admissions of its directors or other officers, but by the records of their proceedings kept by the appointed officers. They act through these officers—their governing body may be changed from time to time, and different courses of action be adopted—the law, I think, must require the written evidence of their books and not the informal and possibly contradictory verbal statements of witnesses to prove what was done or intended by such governing body.

I think we have no sufficient evidence before us to uphold the decision appealed from as to these Blain shares.

As to the claim in respect of the other shares on which a large discount had been allowed, I incline to think that the defendant's position can be maintained on the grounds taken in the Court below. The discounts appear by the books to be allowed in February, 1887, before defendant became a director, and I see no reason to doubt his assertion that he had no knowledge whatever that there had been such discount allowed.

Judgment.

HAGARTY,  
C.J.O.

It appears that a resolution of the board was passed allowing this discount of twenty per cent., and another resolution extending the time to 1st February, 1887. All these proceedings as to discount are admitted to have been confirmed at a long subsequent meeting of shareholders duly convened.

The statute 44 Vic. (O.) ch. 73, sec. 16, gives the extraordinary power to the directors "to accept payment at any time before making any final call, and to allow such percentage or discount thereon as they may deem expedient and reasonable, and thereupon to issue scrip to each subscriber to the full amount of such stock subscribed."

The Legislature must have had unbounded trust in the ability and good faith of directors in granting this power.

I do not think this defendant can be charged with anything as still unpaid on his stock so acquired from the parties (four in number) who had this stock placed in the book as fully paid up, by crediting them with this discount.

OSLER, J. A. :—

[The learned judge stated the facts and proceeded:]

The plaintiffs contend that there was no sufficient evidence that the seventy-five shares had been in fact converted into paid-up shares in the manner proposed, and therefore that the defendant simply appeared in the books as, and was really the holder of seventy-five of Blain's unpaid shares; and secondly, even assuming that everything had been formally done, that such a transaction would be *ultra vires* the directors and a dealing with the capital of the concern in a manner not authorized by law.

The first objection though taken at the trial and renewed in the reasons of appeal, seems not to have been discussed in the Divisional Court, and is not referred to in the judgment of the trial judge, or of my brother Ferguson, who spoke for the Divisional Court. But it appears to me to be one that is fatal to the defendant's contention, and that strikes at the root of this part of his case. There was no



resolution passed by the board of directors, and nothing appears in the books to shew that the capital paid in upon the whole of Mr. Blain's holding had been transferred to seventy-five shares of it, paying up those seventy-five shares in full and leaving the remainder with nothing paid thereon.

If the board were to make a call to-morrow upon the whole of these shares, where is the proof that they are not legally and equitably entitled to do so? Or, if they attempted to sue Mr. Blain or to make a call for the forty per cent. supposed to have been transferred from the one hundred and thirteen shares to the seventy-five, where is the proof that it was done? No such proof exists. In matters of this kind the company's action must at least be evidenced by resolution of their directors, or by some authorized and authoritative entry in their books which is here wholly wanting.

If evidence of the character of that offered at the trial was sufficient to prove the conversion of seventy-five unpaid shares into the same number of paid up shares, it would be equally effective to prove a surrender or forfeiture of the remaining one hundred and thirteen shares, a proposition which needs only to be stated to shew how far short it comes of proving either.

It is unnecessary in this view to express any opinion whether the directors could, without receiving from the shareholder any further payment thereon, have converted some of his shares into paid-up shares by what may be described as a process of bookkeeping, a question which, when it arises for decision, will deserve serious consideration (Note *Re North Australian Territory Co. (Lim.)* 64 L. T. R., N. S. 140; 91 L. T. 393).

The result is that the defendant being affected with the amplest notice of everything surrounding the acquisition by him of these seventy-five shares from Mr. Blain, cannot assert as against the plaintiffs that he holds them as paid-up shares, and is therefore liable to the extent of the sixty per cent. remaining due thereon to satisfy the

Judgment.

OSLER,  
J.A.

Judgment. demand in this action. I trust it will be found that he is not entirely without remedy for the unfortunate position in which he thus finds himself.

OSLER,  
J.A.

I refer to *Page v. Austin*, 10 S. C. R. 132, at pp. 154-8; *McCracken v. McIntyre*, 1 S. C. R. 479, at p. 524.

As the balance due upon the seventy-five shares is much more than sufficient to satisfy the plaintiffs' demand in this action, it seems hardly necessary to enter upon an enquiry as to the remaining shares (a large number) acquired from the other directors, and upon which, as it is contended, twenty per cent. remains unpaid.

The finding of fact by the trial judge (with which the Divisional Court has agreed), that the defendant took these shares as paid-up shares, relying upon the representation of the secretary that they were paid-up, brings the defendant within the rule stated by Mr. Justice Strong in *Page v. Austin*, 10 S. C. R. at p. 154: "When, however, shares improperly issued as paid-up have come into the hands of a subsequent transferee as a *bonâ fide* purchaser for value, who has taken them upon the representation of the proper officers of the company made to him directly, either in answer to enquiries or otherwise, or upon the faith of a written representation appearing on the certificates, that the shares are paid up, it is well established that no liability, either in law or in equity, attaches to the shares in the hands of such an innocent purchaser." There is some evidence in support of the finding, and the disposition of the case as to these shares may, under the circumstances, well rest upon it.

The appeal must, therefore, be allowed as to the seventy-five shares, and judgment entered for the plaintiffs for the amount of their claim, which can be ascertained by the Registrar of the Court.

MACLENNAN, J. A. :—

I shall first consider the question as to the shares on which a discount was allowed by the directors for payment of calls in advance.

Section 15 of the Act of incorporation provides that calls should not be made at any one time for more than ten per cent.; that four weeks' notice of such call should be given, and that there should be an interval of not less than three months between calls. The effect of this provision is that payment of the whole capital could not be enforced in a shorter period than two years and a-half.

Judgment,  
MACLENNAN,  
J.A.

Section 16 authorizes the directors to accept payment in full for stock at any time after subscription, or at any time before final call, and to allow any discount they might deem expedient or reasonable.

On the 20th September, 1886, after four calls had been made, the board authorized a discount of one-third for payment of shares in full on or before the 1st of November following. On the 10th November, the time for payment was extended to the 1st of February, 1887. These resolutions were availed of very largely, but there was not a strict compliance therewith, some small payments having been accepted later than the 1st of February, although the discounts were credited on that date in the books of the company to all who had made considerable payments in advance.

Mr. Neelon did not become a director of the company until March, 1887, and he was wholly ignorant of the discount resolutions, and of the fact that allowances of that kind had been made on account of payments on stock.

The deed of the 1st November, 1887, contains a declaration by the company that the shares Mr. Neelon was to receive were paid up shares, and they, having been transferred to him for valuable consideration without any notice that they were not paid up, must, I think, in his hands, be regarded to all intents and purposes as fully paid up, and that the plaintiffs' claim in respect of this class of shares wholly fails: *Burkinshaw v. Nicolls*, 3 App. Cas. 1004; *McCracken v. McIntyre*, 1 S. C. R. 479.

The same considerations do not apply to the seventy-five shares received from Mr. Blain. As far as I can discover it was not argued either before Mr. Justice Robertson or before

Judgment. the Divisional Court that no effective agreement was ever  
MACLENNAN, made between Mr. Blain and the company appropriating the  
J.A. money which had been paid upon all the shares held by him, to a part of them, namely seventy-five of such shares so as to make those seventy-five fully paid-up. That argument appears to have been made for the first time in this Court. It appears to have been conceded in the argument in the Court below that there was such an agreement in fact, and we have not the benefit of any discussion or decision of the question by those learned judges. There can be no doubt whatever of what was intended to be done, and what would have been done by the board if any one had proposed a resolution; but unfortunately there was no resolution proposed, and no corporate act was done which could in any way bind the corporation to the appropriation intended. Mr. Blain understood what was intended, and acted upon it by signing a transfer expressed to be in consideration of \$3,750, the whole sum which had been paid on all his shares. But Mr. Blain's understanding alone was not sufficient. He could not by his own act or deed alone change the seventy-five shares into fully paid-up shares, by transferring to them what had been paid on the remaining shares. Therefore, so far as the company is concerned, these seventy-five shares are in my opinion still only paid-up to the extent of forty per cent. Such being the position of these shares as regards the company, we must hold that they are in no better position in Mr. Neelon's hands, for he admits that he knew how they stood at the date of the deed, and that it required something to be done by the company to make them fully paid up. He left it to others to do, and thought it had been done, but it had not, and he must suffer the consequences of the business not having been properly attended to.

In his examination put in at the trial he says :

"There was no arrangement made between the Niagara Central Railway Company and Blain and myself, whereby the \$3,750.00 which Blain had previously paid on his stock, was to be taken in payment of seventy-five shares of stock.



I am not aware that Blain made any such payment. Judgment.  
Blain paid into the company \$3,750.00 on stock which I MACLENNAN,  
got." J.A.

I am therefore of opinion that we must allow the appeal as to the seventy-five shares, but the judgment as to the other shares must be affirmed.

BURTON, J. A., concurred.

*Appeal allowed in part.*

END OF VOL. XVIII.

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## APPENDIX.

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Cases reported in the Ontario Appeal Reports disposed of by the Judicial Committee of the Privy Council and the Supreme Court of Canada since the publication of Volume 17, up to March 1st, 1892.

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### JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

BALDWIN v. KINGSTONE, 18 A. R. 63.—The appeal of the defendants from the judgment of this Court was argued before the Judicial Committee (Lords Hobhouse, Macnaghten, and Hannen, and Sir Richard Couch) in July, 1891. At the conclusion of the argument their Lordships intimated that they would take time to consider the question arising under the Statute of Limitations, but that on all the other points arising in the case, they fully agreed with the judgment of the Court of Appeal. Subsequently their Lordships intimated that they were unable to come to an agreement upon the reserved question, and directed that the case should be re-argued before themselves and other members of the Committee. Before the day fixed for the re-argument the case was settled.

HUNTINGTON v. ATTRILL, 18 A. R. 136.—Appeal allowed and judgment entered for the plaintiff; February 17th, 1892.

### SUPREME COURT OF CANADA.

DUNCAN v. ROGERS, 16 A. R. 3.—Appeal allowed as to the road across the lots, and action dismissed as to that road. Appeal dismissed as to the road granted by the deed of March 30th, 1878; November 10th, 1890.

MACLENNAN v. GRAY, 16 A. R. 224.—Appeal allowed and judgment of the Chancellor restored; January 19th, 1891, *sub nom. Gray v. Coughlin*.

ONTARIO LOAN AND DEBENTURE COMPANY v. HOBBS, 16 A. R. 255.—Appeal allowed and judgment of the Divisional Court restored; December 10th, 1890.

MOLSON'S BANK v. HALTER, 16 A. R. 323.—Appeal dismissed with costs; December 10th, 1890.

LEMAY v. McRAE, 16 A. R. 348.—Appeal dismissed with costs; December 10th, 1890.

IN RE GODSON AND THE CITY OF TORONTO, 16 A. R. 452.—Appeal dismissed with costs; November 10th, 1890.

MAGEE v. GILMOUR, 17 A. R. 27.—Appeal dismissed with costs; December 11th, 1890.

GRANT v. PEOPLE'S LOAN AND DEPOSIT COMPANY, 17 A. R. 85.—Appeal dismissed with costs; December 11th, 1890.

MARSHALL v. McRAE, 17 A. R. 139.—Appeal allowed with costs; June 22nd, 1891.

THE ELECTRIC DISPATCH COMPANY OF TORONTO v. THE BELL TELEPHONE COMPANY OF CANADA, 17 A. R. 292.—Appeal dismissed with costs; November 17th, 1891.

SHAIRP v. THE LAKEFIELD LUMBER COMPANY, 17 A. R. 322.—Appeal dismissed with costs; November 17th, 1891.

TOWNSHIP OF BARTON v. CITY OF HAMILTON, 17 A. R. 346.—Appeal dismissed with costs; November 17th, 1891.

REGINA v. COUNTY OF WELLINGTON, 17 A. R. 421.—Appeal dismissed with costs; November 16th, 1891; *sub nom. Quirt v. The Queen*.

BRANTFORD, WATERLOO AND LAKE ERIE R. W. Co. v. HUFFMAN, 18 A. R. 415.—Appeal dismissed with costs; June 22nd, 1891.

HEWARD v. O'DONOHUE, 18 A. R. 529.—Appeal allowed with costs; June 22nd, 1891.



A DIGEST  
OF  
ALL THE CASES REPORTED IN THIS VOLUME.  
BEING DECISIONS IN THE  
COURT OF APPEAL FOR ONTARIO.

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**ACCEPTANCE.**

*See* SALE OF LAND.

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**ACCOUNTS.**

*See* PAYMENT, 2.

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**ACQUIESCENCE.**

*See* WILL, 2.

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**ACTION.**

*See* COUNTY COURT; JUDGMENT.

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**ADVERSE POSSESSION.**

*See* STATUTE OF LIMITATIONS.

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**ALIMONY.**

*See* ABRAHAM V. ABRAHAM, 436.

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**APPEAL.**

*See* DRAINAGE, 3; EXECUTION.

**APPROPRIATION OF PAYMENTS.**

*See* PAYMENT, 2.

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**ASSESSMENTS.**

*See* INSURANCE.

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**ASSIGNS.**

*See* MORTGAGE, 1.

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**ASSIGNMENTS AND PREFERENCES.**

1. *Division Court—Garnishment of debt—Subsequent assignment by primary debtor.—Priorities—R. S. O. (1887), ch. 124, sec. 9.*—An assignment for the benefit of creditors by a primary debtor after a garnishing summons has been duly served upon him and the garnishee, and judgment has been obtained thereon against the debtor, does not intercept or take precedence of the attachment of the debt, and the primary creditor may obtain judgment

against and enforce payment thereof by the garnishee.

Judgment of the First Division Court of York reversed. *Wood v. Joselin*, 597.

2. *Bankruptcy and Insolvency—R. S. O. (1887), ch. 124, sec. 2.*—A security for a pre-existing debt taken in good faith when the debtor is in insolvent circumstances, cannot be impeached where it is given in consequence of pressure by the creditor or where an intent on the part of the debtor to give a voluntary preference is otherwise rebutted.

*Molson's Bank v. Halter*, 18 S. C. R. 88, followed S. C., 16 A. R. 323, and *Johnson v. Hope*, 17 A. R. 10, considered. *Gibbons v. McDonald*, 159.

3. *Money advanced to insolvent to pay creditors—Action to set aside security—Consideration bad in part.*—Two actions brought to set aside two chattel mortgagees as void under R. S. O. ch. 124, were tried together. In the first case the mortgagee being surety for a debt of the mortgagor, raised money and advanced it with a large additional amount to the mortgagor who was then in insolvent circumstances to the knowledge of the mortgagee receiving therefor the mortgage in question. The insolvent thereupon paid the debt for which the mortgagee was surety and other notes on which relatives were indorsers out of the money thus raised :—

*Held*, that the mortgage was valid.

*Seemle*, that it would be so whether the mortgagee knew of the insolvent's intention to apply the moneys to pay off certain creditors in preference to others or not.

In the second case, it was shewn that the mortgage was unreal and

fraudulent as to \$500, part of the alleged consideration of \$4,000 :—*Held*, that it was therefore void as to the whole, following *Commercial Bank v. Wilson*, 3 E. & A. R. 257.

Judgment of Boyd, C., in the first case reversed, and in the second case affirmed. *Campbell v. Roche—McKinnon v. Roche*, 646.

See *Abraham v. Abraham*, 436.

See FRAUDULENT PREFERENCE.

## BANKS AND BANKING.

*Shares—Transfers—Winding-up Act.*—After a winding-up order has been made, it is too late for holders of shares, entered as such in the books of the bank, to escape liability by showing irregularities in transfers to more or less remote predecessors in title.

A loan company which advances money on the security of shares, which are transferred to it, and accepted by it, in the ordinary absolute form, cannot escape liability on the ground that it is merely a trustee for the borrower.

Judgment of ROBERTSON, J., affirmed. *In re Central Bank of Canada. Home Savings and Loan Company's Case*, 489.

See *In the matter of the Central Bank of Canada. Nasmith's Case*, 209.

## BANKRUPTCY AND INSOLVENCY.

See ASSIGNMENTS AND PREFERENCES, 2—FRAUDULENT PREFERENCE—PRINCIPAL AND SURETY.

# **BREACH.**

*See* **BOND.**

## **BILLS OF EXCHANGE AND PROMISSORY NOTES.**

*See* *Central Bank of Canada v. Garland*, 438.

# **BOND.**

*Condition—Breach—Damages.*—The defendant in response to an advertisement by the plaintiffs, sent in a tender for the construction of certain works. His tender was defective because not executed by sureties and accompanied by a deposit. It was not accepted, but negotiations took place between the plaintiffs and the defendant in connection with it, and the defendant signed a bond conditioned within four days to furnish the sureties and make the deposit and execute all proper and necessary agreements for the doing of the work in question. The terms of the contract had not been settled between the parties. The defendant did not within four days furnish sureties or make a deposit or sign any agreement, and no agreements were within that time made between the parties, or tendered to the defendant for execution:—

*Held*, [BURTON, J. A., dissenting] that as the terms of the contract had not been settled between the parties, there was no default on the part of the defendant of which the plaintiffs could complain, and no liability for damages.

Judgment of ARMOUR, C. J., affirmed. *Brantford, Waterloo, and Lake Erie R. W. Co. v. Huffman*, 415.

# **BY-LAW.**

*See* **MUNICIPAL CORPORATIONS**, 1.

## **CANADA TEMPERANCE ACT.**

*Application of fines—49 Vic. ch. 48, sec. 2 (D.)—Money paid and received.*—The Canada Temperance Act came into force in the united counties of Leeds and Grenville on the 1st May, 1886.

Section 2 of the Act declares that the word "County" includes every town, township, etc., within the territorial limits of the county, and also a union of counties.

The town of Brockville was then an incorporated town separate from the counties for municipal purposes.

An order-in-council passed pursuant to 49 Vic. ch. 48 (D.) provided that all fines recovered under "The Canada Temperance Act, 1878," within any *city or county* which had adopted the Act, should be paid to the treasurer of the city or county as the case might be. Subsequently another order-in-council was passed cancelling the former, and providing for payment of such fines to the treasurer of the *city or incorporated town, separated for municipal purposes* from the county, or *county* within which they were recovered:—

*Held* [MacLennan, J. A., dissenting], that fines imposed and recovered for offences against the Act committed within the town of Brockville, paid over by the police magistrate of Brockville to the treasurer of the united counties of Leeds and Grenville between the dates of the two orders-in-council, could not, after the passing of the second order-in-council, be recovered back by Brockville.

Judgment of the Queen's Bench Division, 17 O. R. 261, reversed.

*United Counties of Leeds and Grenville v. Town of Brockville*, 548.

### CASES.

*Beauchamp, Earl*, v. *Winn*, L. R. 6 H. L. 223, followed.]—See WILL, 2.

*Clark v. Harvey*, 16 O. R. 159, considered.]—See MORTGAGE.

*Commercial Bank v. Wilson*, 3 E. & A. R. 257, followed.]—See ASSIGNMENTS AND PREFERENCES, 3.

*Cooper v. Phibbs*, L. R. 2 H. L. 148, followed.]—See WILL, 2.

*Corham v. Kingston*, 17 O. R. 432, considered.]—See MORTGAGE, 2.

*Ellis v. Emmanuel*, 1 Ex. D. 157, considered.]—See PRINCIPAL AND SURETY.

*Essex and Rochester, Re*, 42 U. C. R. 523, questioned.]—See DRAINAGE, 1.

*Gilchrist and Island, In re*, 11 O. R. 537, considered.]—See MORTGAGE, 1.

*Harwich and Raleigh, Re Townships of*, 20 O. R. 154, approved.]—See DRAINAGE, 1.

*Johnson v. Hope*, 17 A. R. 10, considered.]—See ASSIGNMENTS AND PREFERENCES, 2.

*Molson's Bank v. Halter*, 18 S. C. R. 88, followed.]—See ASSIGNMENTS AND PREFERENCES, 2; FRAUDULENT PREFERENCE.

*McVean v. Tiffin*, 13 A. R. 1, considered.]—See MECHANICS' LIEN.

*Parker v. Parker*, 32 C. P. 113, approved.]—See EVIDENCE.

*Rogers v. Ingham*, 3 Ch. D. 351, followed.]—See WILL, 2.

*Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 432; 9 S. C. R. 311, considered.]—See RAILWAYS.

*Tylee v. Deal*, 19 Gr. 601, approved.]—See WILL, 2.

### CO-DEFENDANTS.

See HUSBAND AND WIFE.

### COLLATERAL HIRE RECEIPTS.

See *Central Bank of Canada v. Garland*, 438.

### COLLUSIVE PURCHASE.

See EXECUTION.

### COMPANY.

*Corporate act* — *Appropriation of payments on stock*—*Informal action of directors*—*Shares wrongly treated as paid up*—*Rights of holder without notice*.]—An agreement was entered into between a company, certain of its shareholders and the defendant, who was vice-president of the company, whereby it was agreed that the shareholders should procure certificates for the amount of certain stock of the company held by them which was to be fully paid up, and should transfer the same to the defendant in consideration of advances of money to be made by him to the company. One of these shareholders held 188 shares of the stock with forty per cent. paid up thereon, and being unable to pay up



the remaining sixty per cent. it was suggested at a meeting of the directors that for the purpose of enabling the agreement to be carried out, the payments upon the 188 shares should be wholly applied to seventy-five shares, which should then be transferred to the defendant as fully paid up shares. This suggestion was acted upon by an entry being made in the company's books of the transfer to the defendant of the seventy-five shares as paid up stock, but no resolution authorizing this appropriation was passed, nor was the company's certificate for such stock procured. All the facts were known to the defendant:—

*Held*, in an action by judgment creditors of the company, that the intended appropriation was not made with the authority of the company by any corporate act, and that therefore there remained sixty per cent. still unpaid on the seventy-five shares for which defendant was liable:—

*Held*, also, that shares only partly paid up, which had been improperly recognized as fully paid up by the directors, whose action in regard to them had been confirmed by a general meeting of shareholders, must be treated, as against creditors of the company, as fully paid up shares in the hands of a transferee for value without notice of the actual facts. *Thorold v. Neelon*, 658.

See *In the matter of the Central Bank of Canada. Nasmith's Case*, 209; *Fire Insurance*.

## CONDITION.

See *BOND*.

## CONDITIONAL SALE.

See *SALE OF GOODS*.

## CONSTITUTIONAL LAW.

See *INTOXICATING LIQUORS*.

## CONTRACT BY IMPLICATION.

See *HUSBAND AND WIFE*.

## CORROBORATION.

See *EVIDENCE*.

## COUNTER-CLAIM.

See *MECHANICS' LIEN*.

## COUNTY COURT.

*Jurisdiction — Action — Assignment Act—R. S. O. (1887) ch. 124, sec. 20, sub-sec. 5.*—An action asking for a declaration of right to rank on an insolvent estate is not within the jurisdiction of the County Court.

Judgment of the County Court of Huron affirmed, *HAGARTY, C. J. O.*, dissenting. *Whidden v. Jackson*, 439.

## CROWN.

*Injunction—Breach of charter.*—The defendants were incorporated by letters patent under the Street Railway Act, R. S. O. (1887) ch. 171, which authorized them to construct and operate (on all days except Sundays) a street railway.

*Held*, [MACLENNAN, J.A., dissenting] that an action would not lie by the Crown to restrain the defendants from operating the road on Sunday, the restriction against their doing so being at most an implied one, and no substantial injury to the public or

any interference with proprietary rights being shewn.

Judgment of the Common Pleas Division, 19 O. R. 624, affirmed. *Attorney-General v. The Niagara Falls, Wesley Park and Clifton Tramway Co.*, 453.

### DAMAGES.

See BOND—MORTGAGE, 2—RAILWAYS.

### DEBTOR AND CREDITOR.

See PAYMENT, 1, 2.

### DEFAULT.

See SALE OF GOODS.

### DEFECT.

See *Hamilton v. Groesbeck*, 437.

### DELAY.

See PAYMENT, 1.

### DEVOLUTION OF ESTATES ACT.

See VENDOR AND PURCHASER.

### DISCLAIMER.

See WILL, 1.

### DISSOLUTION OF PARTNERSHIP.

See *McCraney v. McCool*, 217.

### DIVIDENDS.

See PRINCIPAL AND SURETY.

### DIVISION COURT.

See ASSIGNMENTS AND PREFERENCES, 1—EXECUTION—PROHIBITION.

### DRAINAGE.

1. *Municipal Corporations—R. S. O. (1887), ch. 184, sec. 569, et seq.*—The burden of extra or unforeseen expense in connection with drainage works, constructed under the Municipal Act, sec. 569, *et seq.*, such as *e.g.*, damages recovered because of negligent construction, must be borne by the ratepayers originally assessed for the cost of the works, and not by the general funds of the municipality. *The Corporation of the Township of Sombra et al. v. The Corporation of the Township of Chatham*, 252.

2. *Municipal corporations—Municipalities interested—Constitution of Board of Arbitrators—R. S. O. (1887), ch. 184, sec. 389.*—Where in a drainage scheme initiated by one township, assessments are made against more than one other township, each township is “interested,” within the meaning of section 389 of R. S. O. (1887), ch. 184, only in the question of its own assessment; and on appeal from the assessment, the arbitration provided for by the Act, is one between each appellant township and the initiating township, not a joint arbitration between the latter and all the other townships assessed.

The scheme of the Act is to make the total cost of the proposed work fall upon the initiating municipality

less such sums as may be properly chargeable against other municipalities for the benefits received by them respectively, and if benefit is disproved the attempted charge fails and is not to be reimposed elsewhere.

*Re Townships of Harwich and Raleigh*, 20 O. R. 154, approved.

*Re Essex and Rochester*, 42 U. C. R. 523, questioned.

Judgment of ARMOUR, C. J., reversed. *In re Townships of Romney and Tilbury West, et al.*, 477.

3. *Municipal Corporations — Drain used by another municipality — R. S. O. (1887), ch. 184, sec. 590.* — Section 590 of R. S. O. (1887), ch. 184 applies only to drains strictly so called, that is, to such outlets as have been artificially constructed, and a municipality from which surface water flows, whether by drains or by natural outlets, into a natural water-course, cannot be called on to contribute to the expense of a drainage scheme, merely because the natural water-course is used as a connecting link between drains constructed under that scheme, and because the drainage scheme is in part necessitated by the large amount of surface water brought into the natural water-course by the municipality in question.

Judgment of ROBERTSON, J., affirmed; BURTON, J. A., dissenting. *In re Townships of Orford and Howard et al.*, 496.

4. *Municipal corporations — Adjoining municipality — Appeal against scheme — R. S. O. (1887), ch. 184, sec. 576.* — An adjoining township cannot be charged under section 576 of R. S. O. (1887), ch. 184, with a proportion of the cost of drainage works which extend beyond the lim-

its of a third township. It is only, if at all, when the works are done by a county council under the appropriate provisions of the Act that an adjoining township can, under such circumstances, be assessed.

*Per OSLER, and MACLENNAN, J.J.A.* Objections to the legality of a drainage scheme may be taken by way of appeal under the arbitration clauses of the Act, but they need not necessarily be so taken, and it is not too late to set them up in an answer to an action.

Judgment of ROSE, J., affirmed. *Township of Stephen v. Township of McGillivray*, 516.

## EVIDENCE.

*Executor and administrator — Corroboration — R. S. O. (1887), ch. 61, sec. 10.* — To enable an opposite or interested party to recover in an action against the estate of a deceased person it is sufficient if his evidence is corroborated, *i. e.*, strengthened, by evidence which appreciably helps the judicial mind to believe one or more of the material statements or facts deposed to. It is not necessary that the case should be wholly proved by independent testimony.

*Parker v. Parker*, 32 C. P. 113, approved.

The production by the plaintiff, an architect claiming payment for his services in drawing plans and making estimates for the erection of a house, of a memorandum in the deceased's hand-writing, showing the rooms and the accommodation required and the suggested cost, and of a sketch of the property:—

*Held*, (BURTON, J. A., dissenting) sufficient corroboration of the plaintiff's evidence.

Judgment of the County Court of York affirmed. *Radford v. Macdonald*, 167.

See EXECUTION.

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## EXCHANGE OF LANDS.

See HUSBAND AND WIFE.

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## EXECUTOR AND ADMINISTRATOR.

See EVIDENCE.

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## EXECUTION.

*Fraud — Collusive purchase — Division Courts — Practice — Appeal — Notes of evidence — Security.* — The goods of a tenant were seized for rent and offered for sale by a bailiff. The tenant bid them in and they were immediately seized under an execution against him on behalf of an execution creditor of the tenant. They were then claimed by a third person, who alleged that the tenant was in reality bidding for him, and this claimant paid the purchase money :—

*Held*, that if the goods were sold at an undervalue owing to the bids being made by the tenant ostensibly for himself as part of a scheme between the tenant and claimant to defeat creditors by keeping down the price, the sale would be fraudulent and void as against the creditors of the tenant, though it would be good as far as the purchase money was concerned, which could not in any event be recovered back by the claimant.

Appeal allowed and new trial ordered.

The right of appeal from the Division Court is not lost because the judge omits in an appealable case to take down the evidence at the trial in writing.

The security to be given on a Division Court appeal is now regulated by 53 Vic. ch. 19, (O.), and is to be either by a bond in the sum of \$100, or a cash deposit of \$50. *Sullivan v. Francis*, 121.

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## FACTORIES ACT.

(R. S. O. (1887), ch. 208.)—See *Hamilton v. Groesbeck*, 437.

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## FAMILY ARRANGEMENTS.

See WILL, 2.

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## FIRE INSURANCE.

See INSURANCE.

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## FOREIGN JUDGMENT.

See JUDGMENT.

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## FOREIGN LAW.

See JUDGMENT.

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## FORFEITURE.

See INSURANCE.

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## FRAUD.

See EXECUTION.



**FRAUDS, (STATUTE OF).**

See SALE OF LANDS, 2.

**FRAUDULENT PREFERENCE.**

*Action to set aside deed—Knowledge by grantee of insolvency—Valuable consideration—Actual intent to defraud—13 Eliz. ch. 5.*]—The fact that the grantors in a deed were to the knowledge of the grantee insolvent at the time of making the deed, is in itself insufficient to cause the deed to be set aside as a fraudulent preference under R. S.O. (1887), ch. 124, (following *Molson's Bank v. Halter*, 18 S. C. R. 88), and where valuable consideration has been given clear evidence of actual intent to defraud the creditors of the grantor is necessary to have the deed declared void under the statute 13 Elizabeth, ch. 5.

Judgment of the Common Pleas Division, affirming the judgment of ARMOUR, C. J., reversed. *Hickerson v. Parrington*, 635.

**FREEHOLDER.**

See MUNICIPAL CORPORATIONS, 1.

**GARNISHMENT OF DEBT.**

See ASSIGNMENTS AND PREFERENCES, 1.

**GUARANTEE.**

See PRINCIPAL AND SURETY.

**HEIR-AT-LAW.**

See WILL, 2.

**HIGHWAY.**

See MINERALS.

**HUSBAND AND WIFE.**

*Power to sell lands—Exchange—Separate estate—Contract by implication.*]—*Held*, reversing the decision of the Common Pleas Division, 19 O. R. 739, that the power of attorney to the husband of the married woman defendant, authorizing him to sell her lands, did not authorize him to exchange such lands for others or to bind her to assume payment of a mortgage on the land given in exchange, and that on the evidence she was not bound thereby :—

*Held*, also, by OSLER and MACLENNAN, J.J.A., that the implied obligation to pay off the encumbrance which in the case of a conveyance of land to a person *sui juris* is imposed by a Court of Equity, is not enforceable against a married woman. It cannot be said to be a contract or promise in respect of separate property.

The practice as to giving relief to one defendant against a co-defendant considered. *McMichael v. Wilkie et al.*, 464.

See UNDUE INFLUENCE.

**INJUNCTION.**

See CROWN.

**INSURANCE.**

1. *Life insurance—Assessments—Forfeiture—Waiver.*]—Where a mutual insurance company have without objection received payment of assessments after the proper date for their

payment, they are not thereby debarred from insisting on a subsequent occasion upon the strict observance of the conditions of the company as to payment when they give notice that they intend so to insist, and there is no conduct on their part tending to mislead the insured.

Judgment of the Queen's Bench Division reversed. *Redmond v. Canadian Mutual Aid Association*, 335.

2. *Fire insurance—Change of interest—Partnership turned into company—Avoidance of policy.*—Where the business of a partnership is taken over by a limited liability company formed for that purpose there is such a change of interest as to invalidate insurances held by the firm in the absence of notification of the change to, and assent by, the insurance company, though the members of the partnership hold nearly all the stock in the limited liability company.

Judgment of FALCONBRIDGE, J., reversed. *The A. G. Peuchen Co. et al. v. The City Mutual Fire Ins. Co.*, 446.

See MORTGAGE, 2.

## INTENT TO DEFRAUD.

See FRAUDULENT PREFERENCE.

## INTEREST.

See MORTGAGE, 2—*Barber v. Clark*, 435.

## INTOXICATING LIQUORS

*Constitutional law—Liquor License Act—Local option—Sale by wholesale—Sale by retail—53 Vic.*

*ch. 56, sec. 18 (O.)—54 Vic. ch. 46, sec. 1 (O.)*—Section 18 of 53 Vic. ch. 56 (O.) allowing, under certain conditions, municipalities to pass by-laws for prohibiting the sale of spirituous liquors is *intra vires* the Ontario Legislature) as is also section 1 of 54 Vic. ch. 46, which explains it, but the prohibition can only extend to sale by retail.

A by-law omitting to provide a penalty for its violation is not necessarily bad. *In re Local Option Act*, 572.

## JUDGMENT.

*Foreign judgment—Penalty—Action to enforce—Foreign law—Lex fori.*—The Courts of this Province will not indirectly enforce the penal laws of a foreign country by entertaining an action founded on a judgment obtained in that foreign country in a penal action.

The court being divided in opinion, both as to the penal nature of the judgment sued on, and as to whether the law applicable to such question, was that of the foreign country or of this Province, the appeal was dismissed, and the judgment of STREET, J., 17 O. R. 245, was affirmed. *Huntingdon v. Attrill*, 136. *Reversed in the Privy Council.*

See *Abraham v. Abraham*, 436.

## JURISDICTION.

See COUNTY COURT.

## LACHES.

See WILL, 2.

**LEASE OF TOLLS.**

*See* WAY.

**LEGACY.**

*See* Barber v. Clark, 435.

**LEVEL CROSSINGS.**

*See* RAILWAYS.

**LEX FORI.**

*See* JUDGMENT.

**LIFE INSURANCE.**

*See* INSURANCE.

**LIQUOR LICENSE ACT.**

*Right of search—Refusal to admit officer—R. S. O. (1887), ch. 194, sec. 130.*—The right of search given by section 130 of the "Liquor License Act," R. S. O. (1887), ch. 194, may be exercised without any preliminary statement of the purpose for which the search is to be made. A formal demand of admittance is sufficient.

Judgment of the County Court of Frontenac reversed, OSLER, J. A., dissenting. *Regina v. Sloan*, 482.

*See* INTOXICATING LIQUORS.

**LOCAL OPTION.**

*See* INTOXICATING LIQUORS.

**MACHINERY.**

*See* Hamilton v. Groesbeck, 437.

**MASTER AND SERVANT.**

*See* Hamilton v. Groesbeck, 437.

**MECHANICS' LIEN.**

*Proceeding to realize—Counter-claim—R. S. O. (1887), ch. 126, sec. 23.*—A defence filed by a lien-holder within the period mentioned in sec. 23 of R. S. O. (1887), ch. 126, in an action by the owner of the property to set aside the lien is not a "proceeding to realize the claim" within the meaning of that section, though a counter-claim, if properly framed and a certificate thereof duly registered might be.

*Per* OSLER, J. A.—Observations as to the effect of registration of the lien. *McVean v. Tiffin*, 13 A. R. 1, considered.

*Per* MACLENNAN, J. A.—The defendant in this action having commenced an independent action and registered his lien within the prescribed period, his lien was preserved and the registration of the certificate in the other action enured to his benefit in the present one, though after judgment establishing his lien he abandoned the other proceedings. *McNamara v. Kirkland*, 271.

**MEMORANDUM IN WRITING.**

*See* SALE OF LAND, 2.

**MINERALS.**

*Natural gas—Right to bore on highway.*—Natural gas is a mineral within the meaning of the Municipal Act, R. S. O. ch. 184, sec. 565, which gives power to the corporation of any county or township to

sell or lease mineral rights under highways. *Ontario Natural Gas Co. v. Gosfield*, 626.

### MISTAKE.

See *Barber v. Clark*, 435.—See WILL, 2.

### MORTGAGE.

1. *Power of sale—Assigns—Short Forms Act, R. S. O. (1887), ch. 107.*—A mortgage made in alleged pursuance of the Short Forms Act contained the following provisions as to sale :—

“Provided that the said mortgagees on default of payment for one month, may on ten days’ notice, enter on and lease or sell the said lands. And provided also that in case default be made in payment of either principal or interest for two months after any payment of either falls due, the said power of sale and entry may be acted upon without any notice. And also that any contract of sale made under the said power may be varied or rescinded. And also that the said mortgagees, their heirs, executors, administrators, and assigns, may buy in and resell without being responsible for any loss or deficiency on resale :”—

*Held* (BURTON, J. A., dissenting), that the power of sale could be validly exercised by the assigns of the mortgagees.

*In re Gilchrist and Island*, 11 O. R. 537; and *Clark v. Harvey*, 11 O. R. 159, considered. *Barry v. Anderson*, 249.

2. *Interest—Insurance—Application of—R. S. O. (1887), ch. 102, sec. 4—Reduction of damages.*—Under

ordinary circumstances a mortgagee can claim interest only from the time the money is advanced.

Where insurance moneys are received by a mortgagee under a policy effected by the mortgagor pursuant to a covenant to insure, contained in a mortgage made under the Short Forms Act, the mortgagee is not bound to apply the insurance moneys in payment of arrears, but may hold them in reserve as collateral security while any portion of the mortgage moneys is unpaid; nor, though he applies part upon overdue principal, is he bound to apply the balance in discharge of overdue interest.

Where damages were assessed by the trial judge generally in favour of several plaintiffs whose rights and interests were distinct, and were apportioned equally between them by the Divisional Court, this Court while holding that one plaintiff only was entitled to recover, reduced the damages apportioned to him, being of opinion that such damages were excessive; it appearing moreover that in the general assessment matters had been taken into consideration of which he was entitled to complain.

*Corham v. Kingston*, 17 O. R. 432, considered.

Judgment of the Queen’s Bench Division, 19 O. R. 677, varied. *Edmonds v. The Hamilton Provident and Loan Society*, 347.

### MUNICIPAL CORPORATIONS.

1. *By-law—Petition—Freeholder—R. S. O. (1887), ch. 184, sec. 9.*—By the term “freeholder,” as used in R. S. O. (1887), ch. 184, sec. 9, which enables a county council to pass a by-law constituting a village corporation, upon the petition of a certain



number of freeholders, is meant a person actually seized of an estate of freehold, legal or equitable; and it does not include persons in possession of land under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions.

Judgment of STREET, J., reversed, MACLENNAN, J. A., dissenting. *In re Flatt and the United Counties of Prescott and Russell*, 1.

2. *Water-rates not a tax on land—Power of city of Toronto to fix water-rates—Discount allowed to taxpayers but not allowed to public buildings—35 Vic. ch. 79 (O.), as amended by 41 Vic. ch. 41 (O.).*—By statute 35 Vic. 79 (O.), as amended by 41 Vic. ch. 41 (O.), the corporation of the city of Toronto was empowered in regard to the city water-works, to fix the price, rate, or rent, which any owner or occupant of any house, lot, etc., in, through, or past, which the water-pipes should run, should pay as water-rate or rent, whether the owner or occupant should use the water or not, having due regard to the assessment and to any special benefit or advantage derived by such owner or occupant, or conferred upon him or his property by the water-works. The corporation was also empowered to fix the rate to be paid for the use of the water by public buildings. Pursuant to these powers, a by-law of the corporation was passed providing that the half-yearly rates "paid within the first two months of the half-year for which they are due, shall be subject to a reduction of fifty per cent., save and except in the case of government or other institutions which are exempt from city taxes, in which cases the said provisions as to discount shall not apply:—"

*Held*, that "government institutions" in the by-law meant government buildings in which some public business is carried on, and were "public buildings" within the meaning of the Act:—

*Held*, also, that the "price, rate, or rent," paid for the water, was not a tax but merely the price paid for the water supplied to the consumer, and that the corporation were not obliged to allow, for water supplied to public buildings, the discount allowed to taxpayers. *Attorney-General of Canada v. City of Toronto*, 622.

See DRAINAGE, 1, 2, 3, 4.

## NEGLIGENCE.

See RAILWAYS, 2; *Hamilton v. Groesbeck*, 437.

## NEW TRIAL.

See RAILWAYS.

## NOTICE OF DISHONOUR.

See PAYMENT.

## PARTITION.

See STATUTE OF LIMITATIONS.

## PARTNERSHIP.

See *McCraney v. McCool*, 217.

## PAYMENT.

1. *Cheque of third person—Pre-sentment—Delay in giving notice of*

*dishonour—Debtor and creditor.*]—Where the cheque of a third person is received from a debtor as conditional payment of an antecedent debt, the creditor must without undue delay present the cheque for payment, and if it is dishonoured notify the debtor of the fact and claim recourse against him on the original indebtedness. Unless this is done the creditor will be taken to have accepted the cheque in payment of the debt and the debtor is discharged.

Judgment of the First Division Court of Wentworth affirmed. *Sawyer v. Thomas*, 129.

2. *Debtor and creditor—Accounts—Appropriation of payments.*]—Appropriation of payments is a question of intention; and where a creditor takes security for an existing indebtedness, and thereafter continues his account with the debtor in the ordinary running form, charging him with goods sold, and crediting him with moneys received, and crediting and charging notes on account in such a way as to render the original indebtedness undistinguishable, there is no irrebuttable presumption that the payments are to be applied upon the original indebtedness.

Judgment of STREET, J., reversed. *Griffith v. Crocker*, 370.

### PENALTY.

See JUDGMENT.

### PLEDGE.

See SHARES.

### POWER OF SALE.

See MORTGAGE, 1.

### PRACTICE.

See EXECUTION—HUSBAND AND WIFE.

### PRESENTMENT.

See PAYMENT, 1.

### PRIMOGENITURE.

See WILL, 2.

### PRINCIPAL AND SURETY.

*Guarantee—Floating balance—Ultimate balance—Bankruptcy and insolvency—Dividends.*]—The plaintiff's testator gave a guarantee in the following form: "In consideration of the goods sold by you on credit to M., and of any further goods which you may sell to M. upon credit during the next twelve months from date, I hereby undertake to guarantee you against all loss in respect of such goods so sold or to be sold; provided I shall not be called on in any event to pay a greater amount than \$2,500."

M., made an assignment for the benefit of his creditors, being then indebted to the guaranteed creditors in the sum of \$5,556.23. They filed their claim therefor with the assignee and afterwards received from the plaintiff the full amount covered by the testator's guarantee.

The plaintiff contended that he was entitled to rank upon the estate for so much of the debt as had been thus paid by him:—

*Held*, [OSLER, J. A., dissenting], that the guarantee was one of the whole debt incurred, or to be incurred, with a limitation of the liability to \$2,500, and, therefore, that the

plaintiff was not subrogated to the rights of the secured creditors or entitled to receive the dividends in respect of that part of the debt which he had paid off under the guarantee.

*Per* OSLER, J. A., the guarantee was a continuing guarantee, limited in amount, to secure a floating balance, and so a guarantee of part of the debt only, the dividends on which, the surety having paid it, he was entitled to receive. *Ellis v. Emmanuel*, 1 Ex. D. 157, considered.

Judgment of the Queen's Bench Division, 20 O. R. 257 reversed, and that of STREET, J., at the trial, 19 O. R. 230, restored. *Martin v. McMullen, et al*, 559.

### PRIORITIES.

*See* ASSIGNMENTS AND PREFERENCES, 1—*Abraham v. Abraham*, 436.

### PROHIBITION.

*Division Court—Error in law.*—Prohibition will not lie to a Division Court merely because the Judge has erred in his construction of a statute where he does not by this error in construction give himself jurisdiction he does not in law possess.

Judgment of the Queen's Bench Division, 19 O. R. 487, reversed. *In re Long Point Company v. Anderson*, 401.

### PROPOSAL.

*See* SALE OF LAND.

### RAILWAYS.

*Level crossings—Ringling bell—Defect in construction—Trespassers—*  
89—VOL. XVIII. A.R.

*Negligence—Damages—New trial.*—Judgment of the Chancery Division in favour of the plaintiffs, reported 19 O. R. 164, affirmed upon the ground that the defendants had omitted to comply with the statutory requirements as to ringing the bell when approaching a railway crossing [BURTON, J.A., dissenting].

*Rosenberger v. Grand Trunk R. W. Co.*, 8 A. R. 432, 9 S. C. R. 311, considered.

*Per* HAGARTY, C.J.O.—Where a railway company in constructing their railway cross an existing highway in a diagonal direction leaving the roadbed of the line some feet below the level of the highway they exceed their statutory powers and are liable to indictment. They are therefore trespassers *ab initio* and chargeable with all injuries resulting even indirectly in consequence of the dangerous condition of the highway to those lawfully using it, and this liability attaches to a company operating the line who have not themselves been concerned in the original improper construction.

*Per* MACLENNAN, J.A.—At the time the road was constructed it was illegal to make a crossing in the manner in which it was made by the company constructing the road and at the time of the accident it was an illegal crossing no matter what company was operating it. *Sibbald v. Grand Trunk R. W. Co.; Tremayne v. Grand Trunk R. W. Co.*, 184.

### REDEMPTION.

*See* SHARES.

### REDUCTION OF DAMAGES.

*See* MORTGAGE 2.

**REGISTRATION.**

*See Abraham v. Abraham, 436.*

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**REPUDIATION.**

*See SALE OF LAND, 1.*

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**RESALE.**

*See SALE OF GOODS.*

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**RIGHT OF SEARCH.**

*See "LIQUOR LICENSE ACT," 482.*

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**ROAD COMPANY.**

*See WAY.*

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**SALE OF GOODS.**

*Conditional Sale—Default—Seizure—Resale—Right to sue for deficiency.*]—After default in payment by the purchaser of a machine under an agreement whereby the property was not to pass until payment in full, with a provision that on default the whole price should fall due and that the vendors should be at liberty to resume possession, nothing being said as to resale, the vendors seized the machine and resold it, and after crediting the proceeds, brought this action to recover the balance of the original price:—

*Held* [MACLENNAN, J. A., dissenting], that by the resale the original agreement had been put an end to and that the plaintiffs had no right of action.

*Per* MACLENNAN, J. A., The vendors became, in effect, mortgagees of

the machine, and on default in payment were entitled forthwith to sell and then sue for the unpaid balance. *Sawyer v. Pringle, 218.*

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**SALE OF LAND.**

1. *Specific Performance—Want of title—Repudiation.*]—A purchaser of land may, on discovering that the vendor has no title, repudiate on that ground; but attempted repudiation on another ground does not keep this right alive, if the vendor at the proper time can make a good title.

Where a purchaser, who in an action by the vendor to compel specific performance, sets up in his defence that the contract was void because of fraudulent misrepresentations as to value, attempted at the trial to repudiate also on the ground of want of title in the vendor, he having known of this want of title for some time, and having because of it obtained an order for security for costs, it was held that there could not then be repudiation on that ground and that it would be sufficient for the vendor to show title on the reference.

Judgment of the Common Pleas Division, 19 O. R. 303, affirmed. *Paisley v. Wills, 210.*

2. *Statute of Frauds—Sale of contract—Acceptance—Memorandum in writing.*]—An acceptance in writing by the owner of land of a written offer therefor addressed to him but unsigned by any purchaser and without any purchaser being named or in any way described therein, is not a sufficient memorandum to satisfy the Statute, and does not become binding upon him when a purchaser is subsequently found who signs the offer.



*Per OSLER, J. A., (dissenting)* such an instrument is a proposal to sell to any one who accepts the offer. *McIntosh v. Moynihan*, 237.

*See* HUSBAND AND WIFE.

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## SECURITY.

*See* EXECUTION.

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## SEPARATE ESTATE.

*See* HUSBAND AND WIFE.

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## SEIZURE.

*See* SALE OF GOODS.

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## SHARES.

*Pledge—Transfers “in trust”—Repledge by first pledgor—Redemption.*]—The plaintiff obtained from a loan company an advance on the security of certain shares in a joint stock company not numbered or capable of identification, which were transferred by him to the managers of the loan company “in trust.” The managers were also brokers, and were as brokers carrying on stock speculations for the plaintiff, and he transferred to them as security for the payment of “margins” certain other shares in the same company, the transfer being in the same form “in trust.” Subsequently the loan company were paid off by the brokers at the plaintiff’s request, and the brokers continued to hold the first shares as well as the others as security. Upon all the shares the brokers then obtained advances from a bank, transferring them to the cashier “in

trust,” and from time to time changed the loan to other banks and financial institutions each transfer being made from and to the managers thereof “in trust.” An allotment of new shares was taken up by the then holders of the pledged shares at the request of the brokers. Subsequently the brokers on the security of the old and new shares obtained a loan from the defendants of a much larger amount than the amount due by the plaintiff to the brokers, the shares being then transferred by the then holders to the defendants.

*Held*, reversing the judgment of STREET, J., 19 O. R. 272, that the defendants were entitled to hold the stock as security for the full amount advanced by them to the brokers; and that the words “in trust” in the transfer meant that the various transferees were holding the shares “in trust” for their respective institutions. *Duggan v. The London and Canadian Loan and Agency Company, et al*, 305.

*See* BANKS AND BANKING—COMPANY.

*See In the Matter of the Central Bank of Canada—Nasmith’s Case*, 209.

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## SPECIFIC PERFORMANCE.

*See* SALE OF LAND, 1.

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## STATUTES.

13 Eliz. ch. 5.]—*See* FRAUDULENT PREFERENCES.

14 & 15 Vic. ch. 6.]—*See* WILL, 2.

35 Vic. ch. 79, (O.).]—*See* MUNICIPAL CORPORATIONS, 2.

41 Vic. ch. 40, (O.).]—*See* MUNICIPAL CORPORATIONS, 2.

49 Vic. ch. 48, sec. 2, (D.).]—*See* CANADA TEMPERANCE ACT.

R. S. O. (1887), ch. 44, sec. 30.]—*See* *Abraham v. Abraham*, 436.

R. S. O. (1887), ch. 61, sec. 10.]—*See* EVIDENCE.

R. S. O. (1887), ch. 102, sec. 4.]—*See* MORTGAGE, 2.

R. S. O. (1887), ch. 107.]—*See* MORTGAGE, 1.

R. S. O. (1887), ch. 108.]—*See* VENDOR AND PURCHASER.

R. S. C. ch. 120, secs. 20, 29, 70, 77.]—*See* *In the Matter of the Central Bank of Canada—Nasmith's Case*, 209.

R. S. O. (1887), ch. 124.]—*See* ASSIGNMENTS AND PREFERENCES, 1, 2, 3.]—*Abraham v. Abraham*, 436; COUNTY COURT; FRAUDULENT PREFERENCES.

R. S. O. (1887), ch. 126.]—*See* MECHANICS' LIEN.

R. S. O. (1887), ch. 141.]—*See* *Hamilton v. Groesbeck*, 437.

R. S. O. (1887), ch. 159.]—*See* WAY.

R. S. O. (1887), ch. 184, sec. 9.]—*See* MUNICIPAL CORPORATIONS, 1—Sec. 389.]—*See* DRAINAGE, 1.—Sec. 565.]—*See* MINERALS.—Sec. 569, et. seq.]—*See* DRAINAGE, 1.—Secs. 576, 590.]—*See* DRAINAGE, 2, 3.

R. S. O. (1887), ch. 194, sec. 130.] *See* "LIQUOR LICENSE ACT."

R. S. O. (1887), ch. 206.] *See* *Hamilton v. Groesbeck*, 437.

53 Vic. ch. 19, (O.)] *See* EXECUTION.

53 Vic. ch. 56, sec. 18. (O.)] *See* INTOXICATING LIQUORS.

54 Vic. ch. 46, sec. 1. (O.)] *See* INTOXICATING LIQUORS.

## STATUTE OF FRAUDS.

*See* SALE OF LAND.

## STATUTE OF LIMITATIONS.

*Tenancies in common—Caretaker of one tenant—Partition—Adverse possession as to co-tenants.*]—The defendant was placed in possession of certain property as caretaker by one tenant in common, who was managing the piece of property in question, and other property, for the benefit of himself and his co-tenants. In 1866 a decree was made declaring that this co-tenant was a trustee for himself and the other co-tenants in certain proportions, and he was ordered to convey to the other co-tenants their shares, to be ascertained by the Master. Various proceedings were taken under the decree, and the shares of the different co-tenants were ascertained, the property in question being allotted to the plaintiffs in 1868, but no conveyances were executed. An order vesting the share of the plaintiffs in them was made in 1888.

*Held* [HAGARTY, C. J. O., dissenting], that the effect of the decree and the ascertainment of the shares was to sever the interests in the property, and that from that time the possession of the defendant ceased to be that of the plaintiffs, who could not, after such time, contend that he was in possession as their caretaker; and therefore that he had acquired title by possession.

Judgment of ROSE, J., reversed.

Subsequently on appeal to the Supreme Court of Canada the judgment of this Court was reversed and the judgment of ROSE, J., restored. *Heward v. O'Donohoe*, 529.

*See* WILL, 1, 2.

## TENANTS IN COMMON.

*See* STATUTE OF LIMITATIONS—WILL, 2.

**TITLE.**

*See* VENDOR AND PURCHASER.

**TOLLS.**

*See* WAY.

**TRANSFERS.**

*See* BANKS AND BANKING—SHARES.

*See In the Matter of the Central Bank of Canada—Nasmith's Case, 209.*

**TRESPASSERS.**

*See* RAILWAYS.

**TRUSTS.**

*See* WILL, 1.

**UNDUE INFLUENCE.**

*Voluntary conveyance — Confidential and fiduciary relationship — Husband and wife.*]—A voluntary conveyance of a large portion of his property by a husband to his wife, a woman of good business ability and having great influence over him, executed without competent and independent advice, when his physical and mental condition were greatly impaired, he subsequently becoming an incurable lunatic, was set aside.

The doctrine of undue influence and fiduciary relationship discussed.

Distinction between undue influence in cases of gifts inter vivos and testamentary gifts referred to.

Judgment of ROSE, J., reversed, HAGARTY, C. J. O., dissenting. *McCaffrey v. McCaffrey*, 599.

**VALUABLE CONSIDERATION.**

*See* FRAUDULENT PREFERENCE.

**VENDOR AND PURCHASER.**

*Title—Devolution of Estates Act —R. S. O. (1887), ch. 108.*]—Under the Devolution of Estates Act, the legal estate in the deceased's land vests in his legal personal representative; and the beneficial owner, whether the debts of the deceased are paid or not, cannot make a good title without a conveyance from the legal personal representative.

Judgment of the Chancery Division, 19 O. R. 705, reversed. *Martin v. Magee*, 384.

**VOLUNTARY CONVEYANCE.**

*See* UNDUE INFLUENCE.

**WAIVER.**

*See* INSURANCE, 1.

**WATER RATES.**

*See* MUNICIPAL CORPORATIONS.

**WAY.**

*Tolls—Road company—Lease of tolls—R. S. O. (1887) ch. 159.*]—A company incorporated under the General Road Companies' Act, R. S. O. (1887) ch. 159, may validly lease

a toll gate and the right to collect tolls thereat [HAGARTY, C. J. O., dissenting]. *Campbell v. The Kingston and Bath Road Company*, 286.

### WILL.

1. *Construction—Per stirpes or per capita—Trusts—Infant trustee—Disclaimer—Statute of Limitations.*—A testator, who died in 1840, by his will made in that year, devised all his property to certain persons as executors and trustees upon trust for the maintenance and support of his wife and unmarried daughters as long as they should continue unmarried and live with his widow, and then directed that “when my beloved wife shall have departed this life, and my daughters shall have married or departed this life, I direct and require my trustees and executors to convert the whole of my estate into money to the best advantage by sale thereof, and to divide the same equally among those of my said sons and daughters who may be then living, and the children of my said sons and daughters who may have departed this life previous thereto.”

*Held*, reversing the judgment of FERGUSON, J., that the division must be *per stirpes* and not *per capita*.

One of the executors and trustees, a son of the testator, was fifteen years of age at the time of the testator's death. He did not, upon coming of age, apply for probate of the will, though when probate was granted to the other executors, leave was reserved to him to so apply, nor did he act in the execution of the trusts. He did not, however, in any way disclaim, and he knew of the will. In 1861, with the knowledge and consent of the acting trustee,

he went into possession of certain lands that had belonged to the testator at the time of his death, believing, as he said, that the lands had been devised to him, and he remained in possession thereof for more than twenty years until the period of conversion and distribution:—

*Held*, [BURTON, J. A., dissenting], affirming the judgment of FERGUSON, J., that he was in law necessarily affected with notice of the provisions of the will and of the express trust thereby created, and that he must be held to have entered as trustee, and not tortiously, and could not invoke the Statute of Limitations. *Wright v. Bell*, 25.

2. *Construction—Heir-at-law—Change in law after will made—Primogeniture—Mistake—Laches—Acquiescence—Family arrangements—Tenants in common—Statute of Limitations.*—A testator, by his will, made on the 14th of August, 1850, devised certain land to his widow for life, and after her death to two nephews, and in the case of the death of them, or either of them, in his own lifetime, he devised the share of such deceased to the heir-at-law, or heirs-at-law of such deceased, his, her or their heirs and assigns. The Act commonly known as the Act abolishing primogeniture, 14 and 15 Vic. ch. 6, was passed on the 2nd of August, 1851, and came into force on the 1st of January, 1852. One nephew of the testator died in 1858, leaving him surviving two sons and two daughters. The testator died in 1866, and his widow in 1870:—

*Held* [GALT, C. J. C. P., dissenting], affirming the judgment of ROBERTSON, J., O. R. 341, that the Act abolishing primogeniture, did



not apply, (1) because the will was made before it was passed or took effect ; and (2), because the land had been lawfully devised by the person who died seized, and therefore that the eldest son of the deceased nephew, as his common law heir, was entitled to the remainder in fee expectant upon the death of the widow.

*Tylee v. Deal*, 19 Gr. 601, approved.

Upon the death of the testator's widow, the three surviving children of the deceased nephew (one daughter had died a short time before intestate and unmarried) entered into possession and enjoyment of the land in question under the belief that they were tenants in common of one undivided moiety thereof, the surviving nephew being entitled to the other undivided moiety. From time to time leases and sales of portions of the land were made in which all parties joined, the instruments containing recitals as to the assumed tenancy in common, and the rents and proceeds of sales being divided among them in the proportion of one-half to the surviving nephew, and one-sixth to each of the others. In 1885, a partition deed was executed of part of the unsold portion. In 1886 the eldest son for the first time had brought to his attention the question of his title under the will, and this action was soon afterwards commenced by him, asking that the title might be declared, the partition deed set aside and the rents and proceeds of sales received by the brother and sister repaid to him :—

*Held*, affirming the judgment of ROBERTSON, J., 16 O. R. 341, that as all parties had acted under a mistake as to, and in ignorance of, the true legal construction of the will

the plaintiff was not barred by laches or acquiescence from recovering any portions of the land unsold at the time his claim was made, and any mortgages to secure purchase moneys of land previously sold and held by the defendants at the time his claim was made, and any moneys received by them after that time, but that there could be no recovery back of the moneys actually received by them before notice of the claim.

*Cooper v. Phibbs*, L. R. 2 H. L. 148 ; *Beauchamp v. Winn*, L. R. 6 H. L. 223 ; and *Rogers v. Inghan*, 3 Ch. D. 351, considered and followed.

*Held*, further, in this also affirming the judgment of ROBERTSON, J., 16 O. R. 341, that as there was no consideration therefor and no compromise or settlement of any disputed question the partition deed and other dealings could not be supported as in the nature of family arrangements :—

*Held*, also [GALT, C. J. C. P., dissenting], reversing the judgment of ROBERTSON, J., 16 O. R. 341, that the eldest son having always received a share of the rents and profits of the undivided moiety was in law always in possession of the whole of that moiety and therefore that no title had been acquired against him by the brother and sister under the Statute of Limitations. *Baldwin v. Kingston*, 63.

See *Barber v. Clark*, 435.

#### WINDING-UP ACT.

See *In the Matter of the Central Bank of Canada—Nasmith's Case*, 209—BANKS AND BANKING.

**WORDS.**

"*Assigns.*"]—See MORTGAGE, 1.

"*Defect.*"] — See *Hamilton v. Groesbeck*, 437.

"*Freeholder.*"] — See MUNICIPAL CORPORATIONS, 1.

"*Moving.*"] — See *Hamilton v. Groesbeck*, 437.

"*Natural gas.*"]—See MINERALS.

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**WORKMEN'S COMPENSATION  
FOR INJURIES ACT.**

(R. S. O., 1887, ch. 141.)

See *Hamilton v. Groesbeck*, 437.

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